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No. 83-386

IN THE
Supreme Court of the United States
OCTOBER TERM, 1983

WILLIAM MASSARSKY,
Petitioner,

v.

GENERAL MOTORS CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Myer Feldman,
Counsel of Record,

Robert L. Deitz
Sherie B. Gumer
GINSBURG, FELDMAN AND BRESS, Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Petitioner

Of Counsel:

Robert H. Jaffe
8 Mountain Avenue
Springfield, N.J. 07081

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QUESTIONS PRESENTED FOR REVIEW

1. Does the mere articulation of internal corporate policies that favor a group of recent high school graduates suffice to rebut an employee's prima facie case of disparate treatment in an age discrimination case?

2. Is proof that corporate policies indisputably favor a group of recent high school graduates sufficient to establish a prima facie case of disparate impact under the Age Discrimination in Employment Act?

PARTIES

Petitioner – plaintiff-appellant and cross-appellee in the Court below – is William Massarsky. Respondent – defendant-appellee and cross-appellant in the Court below – is General Motors Corporation, a Delaware corporation.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioner William Massarsky respectfully petitions this Court, pursuant to 28 U.S.C. § 1254(1) and Rule 19 of the Rules of this Court, for a writ of certiorari to the United States Court of Appeals for the Third Circuit, in the case of *Massarsky v. General Motors Corp.*, 706 F.2d 111 (1983).

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 706 F.2d 111 and is set forth in Appendix A. The District Court issued an unreported opinion, attached as Appendix D, denying Petitioner Massarsky's motion for directed verdict, judgment n.o.v., or new trial.

JURISDICTION

The judgment of the Court of Appeals was entered April 14, 1983. A timely petition for rehearing or rehearing *en banc* was denied May 11, 1983, and is attached as Appendix B. The order denying rehearing was amended on May 16, 1983, and is attached as Appendix C. On Petitioner's timely motion filed July 14, 1983, this Court extended the time within which to file a petition for writ of certiorari to September 8, 1983. This Court has jurisdiction to review the decision of the Court of Appeals under 28 U.S.C. § 1254(1).

STATUTORY PROVISION

The following statute pertains to this case: the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* Relevant provisions of this statute are attached as Appendix E.

STATEMENT OF THE CASE

The facts in this case are undisputed. Petitioner William Massarsky was hired by Respondent General Motors Corp. on September 30, 1963, when he was forty years old, and assigned to the process engineering department of the New Departure-Hyatt Bearings Division of General Motors at its Clark, New Jersey facility. Massarsky was 48 years old and had more than seven years seniority as a senior process engineer when, on February 28, 1971, General Motors laid him off during a division-wide reduction in force. App. A, 2a-3a.

General Motors' policy, as set forth in a handbook, required the company during a reduction in force to lay off employees in each division in accordance with seniority, so

long as ability, merit, and capacity were equal. App. A, 3a. During this time, however, General Motors retained in the process engineering department a younger employee, Joseph Biondo, age 25, who had two fewer years experience than Massarsky. App. A, 3a-4a. General Motors contended that Biondo's retention over the more senior Massarsky resulted from an unpublicized company policy exempting students enrolled in the General Motors Institute ("GMI") from layoffs. App. A, 4a. Biondo was a GMI student. App. A, 3a.

GMI enrolled only recent high school graduates who inevitably were under thirty years of age. The president of GMI testified that "the age makeup of our typical class is primarily in the eighteen to twenty category because we recruit primarily at high schools for our classes." App. A, 29a. Indeed, the personnel director of the Clark plant was asked whether he knew of any GMI students at the plant who were over forty years old. He replied that he did not, nor, for that matter, did he know of any that were older than thirty. Trial Transcript 4.131-4.132. The purpose of the GMI program, as articulated by its president, was "to develop young people, young students in a specific industrially related educational program." Trial Transcript 151 (Oct. 1, 1981).

Massarsky was not recalled by General Motors until February 1976, six months after this suit began. App. A, 4a. During the five years of his layoff, several openings developed in the process engineering department. In accordance with company policy, the company filled these vacancies through transfers and promotions of employees in active service. Three of the employees who were transferred into the process engineering department during Massarsky's layoff were young GMI graduates between the ages of 22 and 25 with less service than Massar-

sky. App. A, 4a. Again, General Motors based these preferential transfers of GMI graduates on a policy giving GMI students yet another advantage over Massarsky: automatically classifying GMI graduates as active employees. App. A, 5a.

Petitioner Massarsky filed suit in United States District Court for the District of New Jersey, claiming that Respondent General Motors discriminated on the basis of age in violation of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 621 *et seq.* After the presentation of evidence, Massarsky moved for a directed verdict on the ground, *inter alia*, that General Motors failed to rebut his prima facie case of employment discrimination. Following a jury verdict in favor of General Motors, Massarsky moved for new trial and judgment notwithstanding the verdict on the ground, *inter alia*, that the court committed prejudicial error by refusing in its jury instructions to refer to General Motors' internal policies exempting GMI students from layoff and requiring the company to fill subsequent openings with GMI graduates rather than with laid-off employees with more seniority. He also claimed that as a matter of law these policies were discriminatory. The motions were denied, and the court entered judgment in favor of General Motors. App. A, 5a; *see* App. D, 54a-55a, 59a.

On appeal, the United States Court of Appeals for the Third Circuit affirmed, 2-1. Analyzing Massarsky's case in accordance with Title VII jurisprudence, the Court rejected his age discrimination claims under both the "disparate treatment" and "disparate impact" theories. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973); *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971).

The Court agreed that Massarsky established a prima facie case of disparate treatment. It held, however, that General Motors, by claiming its treatment of Massarsky resulted from a policy of immunizing GMI students from layoffs, satisfied its burden under *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981), of articulating a "legitimate, non-discriminatory reason" for its actions sufficient to create a genuine factual issue for the jury's resolution. App. A, 11a-14a. The Court concluded that Massarsky failed to prove that General Motors' policy was a mere pretext for unlawful discrimination and thus that General Motors did not intentionally discriminate.[1] App. A, 13a.

The Court of Appeals also rejected Massarsky's claim that General Motors' policies had a disparate impact. Although the Court found that he had demonstrated that General Motors' policies of favoring GMI students adversely affected him, it held that the Act requires a demonstration that the entire group protected by the Act is adversely affected. Thus, the Court held that Massarsky failed to establish a prima facie case of disparate impact, and that the burden never shifted to General Motors to offer some business justification for its discriminatory policy. App. A, 20a.

Judge Sloviter vigorously dissented from the majority's holdings under both theories. First, she argued that when a policy is facially discriminatory, "the policy itself

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[1] The Court of Appeals rejected Massarsky's claim that the jury charge was prejudicial in its failure to refer to General Motors' policies favoring GMI students. Although the Court appears to concede that these policies may have been relevant for establishing pretext, it believed that the trial court "acted sensibly in declining to single out. . .any particular item of evidence . . . ." App. A, 25a.

establishes the intent necessary to show discriminatory intent." App. A, 32a. General Motors' policy, although cast as a preference for GMI students, in reality favored young employees outside the protected age group over employees protected by the Act. Thus, because the policy was facially discriminatory, General Motors failed to meet its burden of articulating a legitimate, non-discriminatory justification for its treatment of Massarsky. App. A, 33a-34a. As a result, Judge Sloviter concluded that Massarsky was entitled to a directed verdict.

Judge Sloviter also found that Massarsky was entitled to judgment under the disparate impact theory. Relying upon this Court's recent decision in *Connecticut v. Teal,* 102 S. Ct. 2525 (1982), Judge Sloviter contended that the Age Discrimination in Employment Act protects individuals and not classes. Because Massarsky established that General Motors' policies adversely affected him, his failure to demonstrate class-wide impact did not defeat his prima facie case. App. A, 38a-40a.

Following the Court's decision, the Third Circuit denied Massarsky's petition for rehearing *en banc* by one vote, with Judges Gibbons, Sloviter, and Becker dissenting. *See* Appendices B, C.

REASONS FOR GRANTING THE WRIT

This age discrimination case, called "complex" by the Court of Appeals, App. A, 2a, demonstrates the need for a definitive decision by this Court on the scope of the requirement that an employer must articulate a legitimate, non-discriminatory reason in response to a prima facie case of disparate treatment. The decision in this case clearly conflicts with decisions of this Court and of other courts of appeals establishing the criteria for proving claims of

employment discrimination. The Court of Appeals misconstrued not only the defendant's burden of rebutting a prima facie case of disparate treatment, but also the plaintiff's burden of establishing a prima facie case of disparate impact.

Petitioner Massarsky, a 48-year-old employee, was laid off by Respondent General Motors during a reduction in force while younger employees with less seniority were retained. When positions became available, General Motors filled them with employees who were younger and who had less seniority than Massarsky. General Motors did not offer any justification for its discriminatory treatment of Massarsky. It relied, instead, upon an internal policy that purported to exempt students enrolled in GMI from layoffs and sought to give GMI graduates a preference whenever positions subsequently became available.

Because GMI students are recent high school graduates, General Motors' policies favoring them clearly discriminate against Massarsky and others like him protected by the Age Discrimination in Employment Act. In rejecting Massarsky's discrimination claims, the Court of Appeals has adopted an erroneous standard which conflicts with decisions of this Court, undermines the Act, and which was sufficiently troubling to compel three judges of the Third Circuit to request rehearing *en banc*.

Part A sets forth the standards established by this Court for analyzing employment discrimination claims. Parts B and C, respectively, demonstrate that the Third Circuit adopted inappropriate standards for analyzing Massarsky's disparate treatment and disparate impact claims.

A. Age Discrimination in Employment Act

The Age Discrimination in Employment Act of 1967, as amended, prohibits an employer, *inter alia*, from dis-

charging or discriminating against any employee on the basis of age "with respect to his compensation, terms, conditions, or privileges of employment" or from limiting or classifying his employees in a way which would "deprive . . . any individual of employment opportunities. . . ." 29 U.S.C. § 623(a)(1), (2).

Congress promulgated the Act "to promote employment of older persons based on their ability rather than age." 29 U.S.C. § 621(b). The Act provides a remedy for "older workers [who] find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs." 29 U.S.C. § 621(a).

Two specific concerns inform the Act. First, Congress believed that older workers were burdened by irrational stereotypes about the effects of age on their ability to perform work. *EEOC v. Wyoming*, 103 S. Ct. 1054, 1058 (1983). Equally important, however, Congress was concerned that older workers were injured by otherwise rational business judgments. Older workers, for example, frequently receive higher wages than younger workers yet offer an employer fewer productive years. Thus, Congress found that "certain otherwise desirable practices may work to the disadvantage of older persons. . . ." 29 U.S.C. § 621(a)(2); *see* 29 C.F.R. § 860.103(h) (cost differential between older and younger employees not a defense to an age discrimination claim); *accord, Geller v. Markham*, 635 F.2d 1027, 1034 (2d Cir. 1980), *cert. denied*, 451 U.S. 945 (1981).

Although the Supreme Court has not enunciated the elements of a prima facie case under the Age Discrimination Act, the lower courts consistently have applied to it the principles of law applicable in cases arising under Title VII of the Civil Rights Act of 1964. 42 U.S.C. § 2000e *et*

seq. See, e.g., Douglas v. Anderson, 656 F.2d 528, 531-32 (9th Cir. 1981); *Williams v. General Motors Corp.,* 656 F.2d 120, 127 (5th Cir. 1981), *cert. denied,* 455 U.S. 943 (1982); *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1010, 1015 (1st Cir. 1979); *Schwager v. Sun Oil Co.,* 591 F.2d 58, 60-61 (10th Cir. 1979); *Rodriguez v. Taylor,* 569 F.2d 1231, 1239 (3d Cir. 1977), *cert. denied,* 436 U.S. 913 (1978); *cf. Lorillard v. Pons,* 434 U.S. 575, 584 (1978) ("[substantive] prohibitions of the ADEA were derived *in haec verba* from Title VII").

This Court has established that a Title VII plaintiff may prosecute his claim under either of two legal theories. First, under the "disparate treatment" theory rooted in *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), a plaintiff may prove that if his employer applied an expressly race-based or sex-based standard in its treatment of him, he suffered intentional discrimination. Alternatively, a plaintiff may rely upon the "disparate impact" theory first articulated in *Griggs v. Duke Power Co.,* 401 U.S. 424 (1971), to prove that his employer's adverse action resulted not from any discriminatory motive but from proof that a "facially neutral employment practice had a significantly discriminatory impact." *Connecticut v. Teal,* 102 S. Ct. at 2531; *see Dothard v. Rawlinson,* 433 U.S. 321, 329 (1977); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975).

To establish a prima facie case of disparate treatment under *McDonnell Douglas,* a plaintiff must establish (1) that he is a member of the protected group; (2) that he applied and was qualified for a job for which the employer was seeking applicants; (3) that despite his qualifications he was rejected; and (4) that after his rejection the position remained open and the employer continued to seek applicants from persons of plaintiff's qualifications.

McDonnell Douglas Corp. v. Green, 411 U.S. at 802. When a plaintiff establishes a prima facie case, the burden shifts to the defendant to articulate a legitimate, non-discriminatory reason for its actions. To rebut this defense, the plaintiff must show that the employer's justification constitutes a pretext for unlawful discrimination.[2]

The plaintiff's burden in establishing disparate impact is somewhat different. To establish his prima facie case, a plaintiff must show that an otherwise neutral employment policy had a discriminatory impact. *Connecticut v. Teal*, 102 S. Ct. at 2531; *see Albemarle Paper Co. v. Moody*, 422 U.S. at 425. To rebut the prima facie case, the employer must articulate some business necessity for its policy, by demonstrating the relationship between the policy or practice and the job. *Griggs v. Duke Power Co.*, 401 U.S. at 432. The plaintiff must then show that the employer is using the practice as a mere pretext for discrimination. *Connecticut v. Teal*, 102 S. Ct. at 2531; *Albemarle Paper Co. v. Moody*, 422 U.S. at 425.

The Court below erred in its analysis of Massarsky's claims under both legal theories. First, the Court of Appeals improperly held that General Motors' policies of ac-

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[2]Although the Third Circuit adopted the view that proof of intention is required in a disparate treatment case under the Age Discrimination in Employment Act, at least one court of appeals has concluded that intention is not an element under the Act. *Compare, e.g., Douglas v. Anderson*, 656 F.2d 528, 531 (9th Cir. 1981) (proof of intention required) *and Williams v. General Motors Corp.*, 656 F.2d 120, 129-130 (5th Cir. 1981) (same), *cert. denied*, 455 U.S. 943 (1982) *with Syvock v. Milwaukee Boiler Manufacturing Co.*, 665 F.2d 149, 154-55 (7th Cir. 1981) (no intention required because "age discrimination may simply arise from an *unconscious* application of stereotyped notions of ability rather than from a deliberate desire to remove older employees from the work force") (emphasis in original).

cording preferential treatment to GMI students – a class exclusively composed of recent high school graduates – constituted a "legitimate, non-discriminatory reason" for its treatment of Massarsky. Equally erroneous was the Court's failure to hold that General Motors' policies favoring young employees – GMI students – constituted a prima facie case of discrimination against those such as Massarsky in the class protected by the Act.

B. Disparate Treatment

The Third Circuit held, and there is no dispute, that Massarsky established a prima facie case of disparate treatment. Massarsky demonstrated that he was a member of the class protected by the Act; that he was laid off by General Motors from a job for which he was qualified; and that others not protected by the Act were retained or placed by General Motors in the same department. App. A, 10a-11a. The Court of Appeals, however, concluded that General Motors had met its burden of articulating a legitimate, non-discriminatory reason for its conduct. The justification accepted by the Court was that General Motors had acted pursuant to a "policy" of insulating GMI students from layoffs during reductions in force, even at the expense of employees, such as Massarsky, with more seniority. App. A, 11a. General Motors made no showing that GMI students or graduates made better or more talented employees. Just the mere fact of enrollment at the school was offered as a basis for the preferential treatment.

As a matter of law, this policy cannot satisfy the defendant's burden of refuting a prima facie case of employment discrimination under the disparate treatment theory. Although a defendant need not "persuade the court" that

its actions were non-discriminatory, it must present a justification showing that its actions were not motivated by a preference for the younger worker or a bias against the older worker. *Texas Department of Community Affairs v. Burdine,* 450 U.S. at 254-55; *see McDonnell Douglas Corp. v. Green,* 411 U.S. at 802. Merely citing a policy without demonstrating that that policy is non-discriminatory cannot constitute the "legally sufficient" justification required by *Burdine* to create a genuine issue of fact for the jury. 450 U.S. at 255. This is particularly true when, as in this case, the employer justifies its treatment by relying on a policy that is itself discriminatory.

Because all GMI students were recent high school graduates – substantially younger than those employees protected by the Act – General Motors' policy of affording them preferential treatment is equivalent to affording preferential treatment to younger employees. Framing a policy to favor a class (GMI students) which the evidence discloses is composed exclusively of employees younger than thirty, is identical to framing a policy favoring those under thirty. As Judge Sloviter in dissent colorfully observed, "[i]f a statute were directed at roses, and a grower described its flower as a fragrant multipetaled red bloom grown on a branch with thorns, is the flower any less a rose?" App. A, 32a. In short, because General Motors' policy of favoring GMI students is nothing more than a proxy for favoring the young at the expense of employees protected by the Act, it is not a "legally sufficient" basis for the company's treatment of Massarsky.[3]

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[3]General Motors' recall policy of favoring GMI graduates over laid off older workers with more seniority must also be considered facially discriminatory. Where, as here, it is uncontested that GMI graduates are younger workers, framing the policy in terms of GMI graduates is no different from framing it in terms of younger workers.

Moreover, the defendant's justification cannot conflict with the underlying purposes of the Act. Because a significant goal of the Act was to shield older workers from the effects of "certain otherwise desirable [employment] practices," 29 U.S.C. § 621(a)(2), the defendant cannot justify its treatment of an older worker by relying on a policy that masks an "otherwise desirable" corporate belief that younger workers offer greater economic benefit.

> To classify or group employees solely on the basis of age for the purpose of comparing costs, or for any other purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation – an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it.

29 C.F.R. § 860.103(h); *see Geller v. Markham*, 635 F.2d at 1034. General Motors' guidelines state that GMI students are not to be laid off because a "division has a considerable investment in these students which should be protected." App. A, 12a. The purpose of GMI, as stated by its president, was to "develop young people, young students." These concerns reflect General Motors' belief that it derives greater benefit from younger employees than older employees. In this case, General Motors' policy protecting GMI students was based on the precise sort of economic calculus that is prohibited by the Act.

There is no contention, of course, that employer training programs for recent high school graduates constitute unlawful age discrimination. However, the Act is implicated whenever a company "insulates" such trainees "from reduction at the expense of employees within the protected age group. . . ." *Williams v. General Motors Corp.*, 656 F.2d at 130 n.17; *cf. Coates v. National Cash*

Register Co., 433 F. Supp. 655, 661 (W.D. Va. 1977) (training cannot form basis of employment decision when lack of training itself is created by age discrimination).

Moreover, as Judge Sloviter points out, Congress considered but rejected an exemption for management training programs in the Act. App. A, 48a. As explained in the House Report accompanying the original bill:

> The committee declined to incorporate a specific exception for management training programs since it was believed so broad an exemption in the law might open a very wide door of possible abuse.

H.R. Rep. No. 805, 90th Cong. 1st Sess. 4, *reprinted in* 1967 U.S. Code Cong. & Ad. News 2213, 2217.

In sum, General Motors' justification for its treatment of Massarsky cannot as a matter of law constitute a legitimate, non-discriminatory reason sufficient to rebut Massarsky's prima facie case of disparate treatment. The Court below has adopted standards that not only dissipate the defendant's burden under the *Burdine* case, but also invite employers to create policies that, however articulated, in fact favor younger workers.[4]

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[4]The Court of Appeals' failure to identify the burden that the Act places upon employers is compounded by its approval of the trial court's charge to the jury. Over Massarsky's objection, the trial court refused to refer to General Motors' policies favoring GMI students and graduates. App. A, 23a.

A jury can deliver a just verdict only if the trial court identifies the evidence that the parties contend supports their respective cases. This is particularly true in the employment discrimination area, where the plaintiff and defendant bear distinct burdens of production. As the First Circuit has held, in an age discrimination case the trial court should outline each element of the *McDonnell Douglas* prima facie case, including plaintiff's contention "that defendant's stated reason

C. Disparate Impact

The standards adopted by the Court of Appeals in reviewing Massarsky's disparate impact claim are equally faulty and conflict with those established by this Court and at least one court of appeals. Even though the Third Circuit conceded that General Motors' policies favoring GMI students had a "pernicious effect" on Massarsky, App. A, 16a, it held that Massarsky failed to make out a prima facie case of disparate impact because he did not prove an adverse effect on the protected class as a whole. App. A, 16a-17a.

The Court of Appeals erred in concluding that Massarsky failed to produce evidence demonstrating the disparate impact of General Motors' policies. It is true that Massarsky submitted no statistical evidence establishing the number of protected employees other than himself who were adversely affected by those policies. He did, however, prove by direct evidence that the group favored by General Motors – GMI students – was composed overwhelmingly, and perhaps exclusively, of recent high school graduates, and that none was over thirty. *See* p. 3, *supra*. By demonstrating the existence of a favored class of young employees – GMI students – Massarsky necessarily established as a logical matter an adverse impact on the class of employees protected by the Act.

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for the discharge was a pretext." *Loeb v. Textron, Inc.*, 600 F.2d at 1018 (footnote omitted). By refusing to refer to General Motors' preference for GMI students, the trial judge failed, as Judge Sloviter observed, "to direct the jury's attention to the heart of [Massarsky]'s case." App. A, 46a. Thus, the trial court prevented the jury from deciding whether General Motors' policy toward GMI students in fact was a pretext for its treatment of Massarsky.

The Age Discrimination in Employment Act, like other employment discrimination provisions, is as concerned with employment policies that favor the unprotected class as with policies that discriminate against the protected class. *Compare* 29 U.S.C. § 623(a)(2) (prohibiting any "classifications" that deprive employees of employment opportunities) *with, e.g.,* 42 U.S.C. § 2000e-2(a)(2) (same). In short, whether a policy discriminates directly against the aged or indirectly by favoring the young is of no consequence under the Act.

The Third Circuit's holding in this case flatly conflicts with the Second Circuit's decision in *Geller v. Markham,* 635 F.2d 1027 (1980), *cert. denied,* 451 U.S. 945 (1981). In *Geller,* the court held discriminatory as a matter of law a policy that limited hiring of school teachers to those with five or fewer years of teaching experience. That policy excluded from consideration more than ninety percent of teachers who were older than forty. The record in this case, as Judge Sloviter pointed out, "supports an even stronger finding, *i.e.* that virtually 100% of the protected class is in the disfavored group because the favored student group is under 40." App. A, 38a.

Moreover, contrary to the Third Circuit's view, a showing of discriminatory impact is not contingent upon proof that policies have class-wide impact. This Court has long held that the protections afforded by employment discrimination statutes benefit individuals, not classes. *Connecticut v. Teal,* 102 S. Ct. at 2535; *Furnco Construction Corp. v. Waters,* 438 U.S. 567, 579 (1978); *Los Angeles Department of Water & Power v. Manhart,* 435 U.S. 702, 708 (1978); *Phillips v. Martin Marietta Corp.,* 400 U.S. 542, 544 (1971) (per curiam). In *Connecticut v. Teal,* the Court flatly rejected the notion that discriminatory treatment of an individual is cured when his class as a whole is

treated favorably. Relying upon the language of Title VII, which focuses upon the "protection of the individual employee, rather than the protection of the minority group as a whole," 102 S. Ct. at 2534, as well as Title VII's legislative history, *id.*, the *Teal* Court concluded that "Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employee's group." *Id.* at 2535. *Accord, Los Angeles Department of Water & Power v. Manhart,* 435 U.S. at 708 ("statute's focus on the individual is unambiguous").

As with Title VII, the focus of the Age Discrimination in Employment Act is on opportunities of the individual, not those of a class. The Act prohibits an employer from, *inter alia,* limiting or classifying its employees "in any way which would deprive . . . any *individual* of employment opportunities . . . because of such individual's age . . . ." 29 U.S.C. § 623(a)(2) (emphasis added). Indeed, as this Court has pointed out, the substantive prohibitions of the Age Discrimination in Employment Act were "derived *in haec verba* from Title VII." *Lorillard v. Pons,* 434 U.S. at 584.

The Court of Appeals agreed that Massarsky demonstrated that General Motors' employment policies adversely affected him. It is undisputed that General Motors' policy of giving favorable treatment to GMI students – recent high school graduates – necessarily harmed any employee who, like Massarsky, was at least forty years old and thereby protected by the Act. Contrary to the Court of Appeals' holding, Massarsky thus established a prima facie case of employment discrimination. That he did not tender statistical proof that others in the protected class were also adversely affected has no bearing under *Connecticut v. Teal.*

In sum, the standard established by the Third Circuit for analyzing disparate impact cases conflicts with decisions of this Court and those of other circuits. Even worse, however, the decision countenances indirect discrimination. So long as employers do not adopt policies that directly burden the aged, the Third Circuit decision allows them to confer special benefits upon groups that are composed only of the young.

CONCLUSION

For the reasons stated, this Court should grant the writ of certiorari to the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

Myer Feldman,
Counsel of Record

Robert L. Deitz
Sherie B. Gumer
GINSBURG, FELDMAN AND BRESS, Chartered
1700 Pennsylvania Avenue, N.W.
Washington, D.C. 20006
(202) 637-9000

Attorneys for Petitioner

Of Counsel:

Robert H. Jaffe
8 Mountain Avenue
Springfield, N.J. 07081

September 8, 1983

APPENDIX A

DECISION

706 F.2d 111

William MASSARSKY and Gertrude Massarsky, his wife,
Appellants in No. 82-5176
v.
GENERAL MOTORS CORPORATION, a
corporation of the State of Delaware,
Appellant in No. 82-5177.
Nos. 82-5176, 82-5177.

United States Court of Appeals,
Third Circuit.

Argued Nov. 16, 1982.
Decided April 14, 1983.
Rehearing and Rehearing En Banc
Denied May 11, 1983.

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Robert H. Jaffe (argued), Howard G. Schlesinger, Jaffe & Schlesinger, Springfield, N.J., for appellants in 82-5176.

James J. Crowley, Jr. (argued), Linda B. Celauro, Carpenter, Bennett & Morrissey, Newark, N.J., Otis M. Smith, Gen. Counsel, Eugene L. Hartwig, Associate Gen. Counsel, David M. Davis, General Motors Corp., Detroit, Mich., for appellant in 82-5177.

Before ALDISERT, SLOVITER and ROSENN, Circuit Judges.

OPINION OF THE COURT

ROSENN, Circuit Judge.

This complex age discrimination case had its genesis in a decision by General Motors Corp. to lay off plaintiff William Massarsky in February 1971 as part of its reduction of the plant workforce. At that time, the Company retained a younger employee who was junior in service to Massarsky. Complaining that the Company discriminated on the basis of age in violation of the Age Discrimination in Employment Act of 1967 (ADEA or the Act), 29 U.S.C. §§ 621 et seq. (1976 & Supp. V 1981), Massarsky brought suit in 1976 in the United States District Court for the District of New Jersey.[1] After a long series of complicated procedural disputes, the case was tried and, based on the jury's answers to special interrogatories, the court entered judgment on all claims in the defendant's favor. Massarsky appeals from the denial of his post-trial motions for judgment notwithstanding the verdict and for a new trial. We affirm.[2]

I. FACTS AND BACKGROUND

General Motors hired William Massarsky on September 30, 1963, when he was 40 years old. He was assigned on a full-time basis to the process engineering department of the New Departure-Hyatt Bearings Division of the Com-

[1]Federal courts have jurisdiction under 28 U.S.C. § 1337 over violations of the ADEA. Massarsky later sought to amend his complaint to assert a pendent claim under the New Jersey Law Against Discrimination (NJLAD), N.J.S.A. §§ 10:5-1 et seq. (1976). Jurisdiction over this state law claim is invoked under 28 U.S.C. § 1332.

[2]General Motors has filed a cross-appeal, even though the district court entered judgment in its favor on all issues. In view of our disposition of the case, we do not address the cross-appeal.

pany at its facility in Clark, New Jersey. On February 28, 1971, after more than seven years of service to the Company, he was laid off from his job as a senior process engineer during a division-wide reduction in force due to an economic downturn.

The system used by General Motors to select employees for layoff was set forth in the company handbook entitled "Working with General Motors." The handbook described the Company's layoff policy as based on the length of the employee's service with the Company, ability, merit, and capacity being equal.[3] Massarsky established at trial (and the Company did not dispute) that employee Joseph Biondo, age 25, was retained during the Company's reduction in force in February 1971. At the time, Biondo was a fifth-year student enrolled in the General Motors Institute (GMI) under a work cooperative program with less than five years of Company service.[4]

[3]The handbook states:

> If it becomes necessary to reduce the number of employees in any classification of work within a department, where ability, merit and capacity are equal, the employee with the least service working in such classification in that department shall be laid off.

[4]General Motors presented evidence showing that GMI is a fully-accredited college that awards degrees in various engineering subjects upon the successful completion of a five-year program. Applicants for GMI are primarily high school students, and the typical beginning student is from 18-20 years of age. During their first four years in the program, GMI students spend part of their time in classes at the GMI campus in Michigan and part of their time in the work-experience program at the General Motors plant sponsoring the student. During the fifth year, the student is assigned on a full-time basis to the sponsoring plant. General Motors guarantees that all GMI students will be given the opportunity to complete their degree requirements (absent academic deficiencies) but does not guarantee employment with General Motors upon graduation. According to the testimony of GMI President Dr. William Cottingham, the purpose of the GMI program is to train future engineering and managerial personnel.

Notwithstanding that Massarsky had over two years more service than Biondo, the Company furloughed Massarsky but retained Biondo on the basis of an unpublicized company policy exempting GMI students from layoffs.[5]

General Motors recalled Massarsky to employment on February 27, 1976. During the five years of his layoff, several openings developed in the process engineering department which the Company filled by transfers and promotions of employees in active service with the Company. This comported with the Company's usual practice of filling vacancies, if possible, by transfers of active employees on the payroll. If no active employee were available, the Company would recall to employment a qualified laid-off employee to fill the vacancy. Three of the active employees who were transferred into the process engineering department during Massarsky's layoff were young GMI students with less service than Massarsky.[6]

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[5]Internal guidelines for reduction in work force distributed to company executives and personnel officials did mention this policy. The relevant portion of the guidelines is set forth at page 12 *infra*.

[6]Although the General Motors employee handbook stated that laid-off employees were to be "given the opportunity to fill openings in the plant or office from which they were laid off," the handbook did not make clear that all active employees, regardless of length of service were given preference over laid-off employees in filing [sic] available jobs. The Handbook described General Motors' policy on recall of laid-off employees in the following terms:

> Laid-off salaried employees whose periods of recall preference have not expired shall be given the opportunity to fill openings in the plant or office from which they were laid off, providing they are qualified to perform the work available. Consideration shall be given to merit, ability, capacity and length of service.

In his complaint,[7] Massarsky alleged that General Motors had violated the federal Age Discrimination in Employment Act by selecting Massarsky for layoff and by its failure to recall him before 1976.[8] Massarsky proceeded on the theory that General Motors' policy of insulating GMI students from layoff during a reduction in work force at the expense of Massarsky and other older workers with longer service to the Company constituted a per se violation of the ADEA. Plaintiff also contended that the Company's internal policy of assigning GMI students to fill openings in a department while a senior employee was on layoff status also constituted a per se violation of the ADEA. Plaintiff's motions for directed verdict, for judgment notwithstanding the verdict, and for a new trial were all denied. On appeal, plaintiff has limited the issues for review to his ADEA claims and his pendent jurisdiction claim under the New Jersey statute.

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[7]Initially, Massarsky also claimed that the layoff and failure to recall constituted a breach of his employment contract, a malicious discharge, and religious discrimination. He eventually abandoned the religious discrimination claim and the district court dismissed the breach of contract claim in August 1977. In March 1977 Massarsky amended his complaint to assert state common law claims for fraud and negligent misrepresentations, and to add his wife as a plaintiff who alleged loss of consortium. None of these other claims are involved in this appeal.

[8]On November 20, 1979, the district court dismissed all of Massarsky's age discrimination claims on the ground that he had failed to file with the Department of Labor a timely notice of intent to sue, as required by the ADEA. In addition, the court suggested that Massarsky had abandoned the claim that his layoff violated the ADEA. The court reinstated Massarsky's age discrimination claims on October 31, 1980, based on this court's interpretation in *Davis v. Calgon Corp.*, 627 F.2d 674 (3d Cir. 1980), *cert. denied,* 449 U.S. 1101, 101 S.Ct. 897, 66 L.Ed.2d 827 (1981), that in New Jersey an ADEA complainant has 300 days to file the notice of intent to sue.

II. THE MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT

The Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 et seq. (1976 & Supp. V 1981), was intended

> to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment.

29 U.S.C. § 621(b). Although section 623(a) of the Act in fairly broad terms proscribes discrimination against "any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age,"[9] this broad prohibition is modified by section 631(a), which limits the protections of the Act to those between the ages of 40 and 70.[10] See 29 U.S.C. § 631(a). Thus, it is not unlawful for an employer intentionally to discriminate against employees under 40 years of age.

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[9]29 U.S.C. § 623(a) provides in pertinent part:

> (a) It shall be unlawful for an employer –
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his . . . terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age;

[10]At the time Massarsky brought his action, the upper age limit of the ADEA was 65. Congress extended protection to employees up to 70 years of age in the Age Discrimination in Employment Act Amendments of 1978, Pub.L. No. 95-256, 92 Stat. 189.

Four exceptions to the ADEA are set forth in section 623(f) of the statute. First, discrimination on the basis of age is allowed "where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business." 29 U.S.C. § 623(f)(1). Second, the Act permits covered entities to "observe the terms of a bona fide seniority system or any bona fide employee benefit plan." *Id.* § 623(f)(2). Third, it is not unlawful for an employer to "discharge or otherwise discipline an individual for good cause." *Id.* § 623(f)(3). Finally, the Act permits employers to discriminate "based on reasonable factors other than age." *Id.* § 623(f)(1).[11]

The United States Supreme Court has said little about the elements of a cause of action under the ADEA. However, because in many respects the provisions of the ADEA parallel those of Title VII, many courts have adapted to issues of age discrimination the principles of law applicable to cases arising under Title VII of the Civil Rights Act.[12] *See Douglas v. Anderson,* 656 F.2d 528, 531-32 (9th Cir. 1981); *Loeb v. Textron, Inc.,* 600 F.2d 1003 (1st Cir. 1979); *Schwager v. Sun Oil Co., supra,* 591

[11]This last exception has enjoyed a two-fold interpretation. The concept of a "reasonable factor other than age" may connote the absence of a causal connection between the individual's age and the adverse employment action. *See Schwager v. Sun Oil Co. of Pennsylvania,* 591 F.2d 58, 62 (10th Cir. 1979). In this sense, the exception is unnecessary because if the discrimination resulted from a factor other than age, necessarily there was no discrimination "because of age" that would invoke the provisions of the ADEA. The "reasonable factors" exception has also been interpreted as a defense to discrimination under the ADEA when the employer has made decisions "based on factors that sometimes accompany advancing age such as declining health or diminished vigor and competence." *Loeb v. Textron, Inc.,* 600 F.2d 1003, 1016 (1st Cir. 1979). *See generally* B. Schlei & P. Grossman, Employment Discrimination Law 403 (1976).

[12]42 U.S.C. §§ 2000e et seq. (1976 & Supp. V 1981).

F.2d at 60-61; *Rodriguez v. Taylor,* 569 F.2d 1231, 1239 (3d Cir. 1977), *cert. denied,* 436 U.S. 913, 98 S.Ct. 2254, 56 L.Ed.2d 414 (1978). A Title VII plaintiff may prosecute his claim under either of two distinct legal theories. First, he may allege that he is the victim of intentional discrimination, i.e., that his employer applied an expressly race-based or sex-based standard in its treatment of the plaintiff. This "disparate treatment" theory traces its roots to *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Alternatively, he may rely upon the so-called "disparate impact" theory of *Griggs v. Duke Power Co.,* 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971). This theory applies when the employer's adverse action resulted not from any discriminatory motive but simply from application of facially neutral criteria that are alleged to have a disproportionate impact on members of the protected class and which cannot be justified by business necessity. *See Dothard v. Rawlinson,* 433 U.S. 321, 329, 97 S.Ct. 2720, 2726, 53 L.Ed.2d 786 (1979); *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425, 95 S.Ct. 2362, 2375, 45 L.Ed.2d 280 (1975). *See also Teamsters v. United States,* 431 U.S. 324, 335-36 n. 15, 97 S.Ct. 1843, 1854 n. 15, 52 L.Ed.2d 396 (1977); *Croker v. Boeing Co.,* 662 F.2d 975, 991 (3d Cir. 1981).

From what we can determine, the plaintiff in the instant case apparently has attempted to straddle these two theories of discrimination. Massarsky argues simply that General Motors failed to present a legally sufficient defense to the plaintiff's prima facie case under the ADEA. We therefore analyze his claim under both the disparate treatment and disparate impact theories. In so doing, we are required to view the evidence and all reasonable inferences therefrom in the light most

favorable to the Company, the prevailing party in the trial court. *Schwager v. Sun Oil Co., supra,* 591 F.2d at 62; *Fireman's Fund Insurance Co. v. Videfreeze Corp.,* 540 F.2d 1171, 1178 (3d Cir. 1976), *cert. denied,* 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977).

A. DISPARATE TREATMENT

A plaintiff alleging disparate treatment, whether under Title VII or under the ADEA, bears the ultimate burden of persuading the jury that his treatment was "caused by purposeful or intentional discrimination." *Smithers v. Bailar,* 629 F.2d 892, 898 (3d Cir. 1980). *See Texas Department of Community Affairs v. Burdine,* 450 U.S. 248, 253, 101 S.Ct. 1089, 1093, 67 L.Ed.2d 207 (1981). But because it often will be difficult for the plaintiff to obtain direct evidence of the employer's motive, the Supreme Court in *McDonnell Douglas Corp. v. Green, supra,* articulated a set of rules of proof that give the plaintiff the benefit of a presumption operating in his favor. Under the *McDonnell Douglas* approach, the plaintiff has the initial burden to establish a prima facie case of unlawful discrimination by a preponderance of the evidence. This prima facie case is easily made out: a plaintiff alleging a discriminatory layoff need show only that he is a member of the protected class and that he was laid off from a job for which he was qualified while others not in the protected class were treated more favorably.[13] *Cf.*

[13]Because Massarsky's complaint concerned a reduction in force, it obviously was unnecessary for him to follow the literal terms of the *McDonnell Douglas* model and show that he was actually replaced by a younger employee. In *McDonnell Douglas,* the elements of the plaintiff's prima facie case were articulated in the context of an alleged discriminatory failure to hire. The Supreme Court made clear that the nature of the required showing depends on the circumstances of the case. *See* 411 U.S. at 802 n. 13, 93 S.Ct. at 1824 n. 13. *See also Teamsters v. United States,* 431 U.S. 324, 358, 97 S.Ct. 1843, 1866, 52

Smithers v. Bailar, supra, 629 F.2d at 894-95; *Rodriguez v. Taylor, supra,* 569 F.2d at 1239. If the plaintiff makes this showing, the employer then bears the burden to "dispel the adverse inference from a prima facie showing under *McDonnell Douglas,*" *Smithers, supra,* 629 F.2d at 894-95, by articulating "some legitimate, non-discriminatory reason" for its treatment of the employee. *McDonnell Douglas, supra,* 411 U.S. at 802, 93 S.Ct. at 1824.

Once the employer presents evidence showing lawful justification for its treatment of the plaintiff, the plaintiff must then prove that the asserted reason was merely a pretext for unlawful discrimination. The ultimate burden of persuasion remains on the plaintiff at all times; the defendant's burden is only to introduce sufficient evidence to create a genuine factual issue concerning the existence of a legitimate justification for the action. *Croker v. Boeing Co., supra,* 662 F.2d at 991. *See Texas Department of Community Affairs v. Burdine, supra,* 450 U.S. at 253-55, 101 S.Ct. at 1093-94. Nevertheless, the *McDonnell Douglas* model eases the plaintiff's burden considerably by compelling the employer to justify its conduct. This circuit has expressly applied the *McDonnell Douglas* approach to cases arising under the ADEA. *See Rodriguez v. Taylor, supra; Smithers v. Bailar, supra.*

In the instant case, Massarsky established a prima facie case of discriminatory treatment under the ADEA by showing that he was within the protected age class and was

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L.Ed.2d 396 (1977); *Williams v. General Motors Corp.,* 656 F.2d 120 (5th Cir. 1981), *cert. denied,* 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982); *Jackson v. U.S. Steel Corp.,* 624 F.2d 436, 440 (3d Cir. 1980) (Title VII case).

laid off from his job as a process engineer even though he was undisputably qualified for that position. It is also undisputed that a person considerably younger in age and with less seniority was retained. This placed on the Company the burden of producing some non-age justification for its employment action. General Motors countered by asserting that Massarsky's layoff was pursuant to company policy to lay off the employee with the least Company-wide service, except that under that policy GMI students were immune from layoff.

Massarsky claims that the policy of immunizing GMI students from layoff was not a "legitimate justification" for the Company's action because the Company thereby extended favorable treatment to a group predominantly composed of young employees (recent high school graduates). But any disproportionate effect of the Company's policy is irrelevant to a claim of "disparate treatment" so long as the personnel action was not motivated by any discriminatory animus.[14] To prevail on this aspect of his claim—intentional discrimination—Massarsky had to show that the Company's policy of insulating GMI students from adverse personnel actions, though age-neutral on its face, was a mere "pretext" for unlawful discrimination on the basis of age. For example, this conclusion would have been warranted had Massarsky established that the Company's purported policy was merely a post-hoc rationalization or a policy that had been

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[14]Of course, disproportionate impact of an employment policy may itself be circumstantial evidence of an intent to discriminate. *See Hazelwood School District v. United States*, 433 U.S. 299, 307-08, 97 S.Ct. 2736, 2741, 53 L.Ed.2d 768 (1977); *Teamsters v. United States*, 431 U.S. 324, 336-39, 97 S.Ct. 1843, 1854-1856, 52 L.Ed.2d 396 (1977).

adopted specifically for the purpose of concealing discrimination on the basis of age.

There was evidence, although offered by plaintiff as pre-trial admissions, that the Company had adopted a five page internal document containing guidelines for use inter alia by the Divisional Personnel Departments in connection with reductions in salaried work force. The guidelines document referred to "special considerations," among which was the following:

> GMI students. GMI students should not be laid off. A division has a considerable investment in these students which should be protected. The GMI cooperative program should be continued.

The guidelines apparently were discussed at an administrative personnel conference on May 6, 1970. In addition, the Company offered evidence that the GMI institute is considerably more than a mere in-plant training program. GMI is a fully accredited five-year college in engineering and management. It operates degree programs in mechanical, electrical, and industrial engineering, and industrial administration. At the time of trial, it had a student body of 2,350 with approximately 20 percent minority students and as much as 35 percent women. Each student pays tuition. This evidence established that the Company policy with respect to GMI student immunity from layoff was in place sometime prior to Massarsky's furlough and that it was not pretextual or a coverup for intentional discrimination. The evidence was sufficient to rebut Massarsky's prima facie case of intentional discrimination.

After considering all the evidence, the jury returned a verdict for General Motors. The jury by special interrogatory determined that Massarsky failed to carry his

burden of persuasion to establish that he was the victim of intentional discrimination because of age. This conclusion had a reasonable basis, given the paucity of evidence of motive presented in this case.

On motions for a directed verdict and for judgment notwithstanding the verdict, the movant must meet a strict test. These motions require the judge "to test the body of evidence not for its insufficiency to support a finding, but rather for its overwhelming effect. He must be able to say not only that there is sufficient evidence to support the finding, even though other evidence could support as well a contrary finding, but additionally that there is insufficient evidence for permitting any different finding." *Fireman's Fund Insurance Co. v. Videfreeze Corp., supra,* 540 F.2d at 1177 (quoting *Mihalchak v. American Dredging Co.,* 266 F.2d 875, 877 (3d Cir.), *cert. denied,* 361 U.S. 901, 80 S.Ct. 209, 4 L.Ed.2d 157 (1959)).

Of course, as the dissent observes, at 127-128, where an employer's policy or practice is discriminatory on its face, it is unnecessary for the plaintiff to make a separate showing of intent to discriminate. Naturally, if General Motors' policy had been to select employees for layoff on the basis of their age, there would be no jury issue of intent. In that situation, the discriminatory treatment would be apparent from the terms of the policy. But here General Motors' policy is not facially discriminatory because it is not expressed in terms of age. The employees who were insulated from layoff received this favorable treatment on the basis of their status as GMI students, not their age. There is nothing to indicate that older persons were precluded from becoming GMI students, or that General Motors was not acting in good faith in operating the General Motors Institute. We simply cannot infer that the

Company was using student status as nothing more than a proxy for age merely because the GMI student population contained primarily younger individuals.[15] In short, there is a vast difference between a shoddy policy framed in terms of age and a well-intentioned policy framed in terms of student status. To hold now that the intent to discriminate may be presumed from the circumstances of this case, in the face of the jury's finding that the policy favoring GMI students was not discriminatorily motivated, would be utterly incomprehensible.

The district court therefore acted correctly in denying the plaintiff's motions for a directed verdict and for judgment notwithstanding the verdict with respect to his layoff under a disparate treament theory of the ADEA.

B. DISPARATE IMPACT

In his appellate briefs, Massarsky primarily characterizes this case as one involving the alleged disparate impact of a facially neutral rule.[16] He contends that General Motors' policy of insulating GMI students from layoff during a reduction in force, in conjunction with the policy of laying off the employee with the least seniority, operated to the detriment of members of the protected age group.

Initially, it should be remembered that *Griggs v. Duke Power Co.*, the landmark case in which the Supreme

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[15]We see nothing in this record to show that there were no older individuals in the GMI program, but see only that GMI students were predominantly recent high school graduates.

[16]During the course of the trial, the district court complained about the shifting nature of plaintiff's theory of recovery.

Court held that a showing of disparate impact alone is sufficient to establish unlawful discrimination, involved race discrimination under Title VII. Although the Second Circuit has expressly recognized the disparate impact doctrine in the ADEA context, *see Geller v. Markham*, 635 F.2d 1027 (2d Cir. 1980), *cert. denied*, 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981), this court has never ruled on whether a plaintiff can establish a violation of the Act by showing disparate impact alone.[17] But even assuming, without deciding, that the disparate impact theory does apply to age discrimination suits, the district court correctly ruled that Massarsky is not entitled to any relief. The plaintiff had failed to make out a prima facie case under this doctrine.

The plaintiff's initial burden with respect to a disparate impact claim is heavier than it is when disparate treatment is alleged. To establish a prima facie case under the disparate impact model, the plaintiff must show "that the facially neutral employment practice had a significantly discriminatory impact." *Connecticut v. Teal*, ____ U.S.____, ____, 102 S.Ct. 2525, 2531, 73 L.Ed.2d 130 (1982). *See Albemarle Paper Co. v. Moody, supra*, 422 U.S. at 425, 95 S.Ct. at 2375. "If that showing is made, the employer must then demonstrate that 'any given requirement [has] a manifest relationship to the employment in question,' in order to avoid a finding of discrimination. . . . Even in such a case, however, the [employee] may prevail, if he shows that employer was using the practice as a mere pretext for discrimination." *Connecticut v. Teal, supra*, ____ U.S. at ____, 102 S.Ct. at

[17]For an argument that disparate impact analysis should not be applied in age discrimination cases, see Note, *Age Discrimination and the Disparate Impact Doctrine*, 34 Stanford L.Rev. 837 (1982).

2531 (quoting *Griggs v. Duke Power Co., supra,* 401 U.S. at 432, 91 S.Ct. at 854). It is apparent, however, that the employer's burden of justifying the employment practice does not arise until after the plaintiff has made out a prima facie case. *See Albemarle Paper, supra,* 422 U.S. at 425, 95 S.Ct. at 2375.

To establish his prima facie case of discriminatory impact, the plaintiff must show that the employer's selection process results in unfavorable treatment of a disproportionate number of members of the protected group to which the plaintiff belongs. *See Dothard v. Rawlinson, supra,* 433 U.S. at 329, 97 S.Ct. at 2726. Thus, an essential element of a disparate impact claim is disparate impact on the protected group.

In the instant case, it is inescapable that Massarsky failed to establish this necessary element of his claim. Because the ADEA only prohibits discrimination against employees between the ages of 40 and 70, Massarsky had to show a disproportionate effect on individuals in that age group. He did, of course, show that the challenged employment practices of General Motors had a pernicious effect on him. But he offered no evidence to show that other similarly situated employees were likewise affected. An adverse effect on a single employee, or even a few employees, is not sufficient to establish disparate impact. *See Whack v. Peabody & Wind Engineering Co.,* 595 F.2d 190, 194 (3d Cir. 1979); *Harper v. Trans World Airlines, Inc.,* 525 F.2d 409 (8th Cir. 1976); *Robinson v. City of Dallas,* 514 F.2d 1271 (5th Cir. 1975) (Title VII cases). We cannot simply assume that a disproportionate number of older employees were adversely affected by the Company's policy of insulating GMI students from layoff. Because General Motors' practice was to lay off the person with the

least service to the Company (assuming that merit, capacity, and ability were equal), whenever a short-service employee was insulated from layoff because of his status as a GMI student, the layoff inevitably would fall on some other employee with slightly more seniority. But it was always only those employees with the least service to the Company who were in danger of layoff. Absent statistical proof, it is pure conjecture to believe that protected older individuals predominated among these short-service employees. Indeed, it is plausible that Massarsky was, as the Company maintains, "an anomaly" because he was a short-service employee in the protected age group.

We recognize that the GMI students who were insulated from layoffs because of the Company's policy may generally have been younger than the employees who were laid off in their place. But this possibility does not help the plaintiff. The ADEA is only implicated when a policy has a differential impact on those within the protected class, i.e., those between 40 and 70 years of age. Even if all laid off employees were older than the GMI students who received special treatment, the Act would not be violated unless those age [sic] 40 to 70 were disproportionately represented among the laid off employees. And the plaintiff has proffered no evidence to show that the Company's policy actually had this differential impact.[15]

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[15]The dissenting opinion asserts that "virtually 100% of the protected class is in the disfavored group" and that "the fact that the policy may also disfavor laid off workers under 40 does not overcome the discriminatory impact on the protected class." At 130. This assertion, though quite possibly true, is not supported by the record. The evidence does not establish that no members of the protected age class are GMI students and thereby insulated from layoff, but shows only that GMI students are predominantly recent high school graduates. More important, the dissenting opinion assumes the very issue in this

The Supreme Court's recent decision in *Connecticut v. Teal, supra,* is fully consistent with this analysis. *Teal* involved a challenge to an examination used to select state employees for promotion to supervisory positions. Because plaintiff Teal failed the examination, the State excluded her from further consideration for permanent supervisory positions. Although the examination was racially discriminatory because it excluded a disproportionate number of black candidates, the State attempted to compensate for the effects of this discrimination by promoting a nigher proportion of eligible blacks than whites in order to reach a nondiscriminatory "bottom line." The Supreme Court held that the examination had a disparate impact on plaintiff Teal because of her race, an impact that could not be cured by the State's extension of favorable treatment to others in the plaintiff's group. Thus, *Teal* stands for the proposition that an employment practice

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case – that the Company's employment practices have a discriminatory impact on the protected class.

The dissent cites *Geller v. Markham,* 635 F.2d 1027 (2d Cir. 1981), *cert. denied,* 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981), but this case is inapposite. In *Geller,* a hiring policy that made over 90 percent of the protected age class ineligible for appointment to teaching positions was deemed discriminatory as a matter of law, notwithstanding that a majority of teachers under 40 were also excluded from consideration. The court was apparently impressed by the extraordinarily high percentage of protected individuals who were disqualified by the employment practice. The instant case is vastly different. Concerned with layoff rather than hiring, Massarsky has shown at most that relatively few older individuals were insulated from layoff under the GMI program. But this has no significance, because only a very small percentage of the workforce as a whole was insulated from layoff. In addition, many older employees were undoubtedly protected from layoff by the Company's seniority policy. In short, Massarsky's case ignores an essential ingredient that was present in *Geller,* a showing that the Company's furlough practices had greater impact on protected individuals than on employees outside the protected age group.

must be analyzed at "the first step in the employment process that produces an adverse impact on a [protected group], not the end result of the employment process as a whole." *Costa v. Markey,* 694 F.2d 876, 880 (1st Cir. 1982).

Judge Sloviter apparently believes that the point at which General Motors' policy had a "disparate impact" occurred when the Company insulated GMI students from layoff. We fail to see how this action alone had any real impact on Massarsky or any employee. The insulation of GMI students from layoff was merely an administrative matter that, at the very most, increased to some small degree the potential that other employees, regardless of their age, might someday be furloughed in the event of operational cutbacks. But there was no tangible impact until it actually became necessary for the Company to lay off a process engineer, and it was then – and only then – that Massarsky was adversely affected. The reason Massarsky was selected for layoff was that he possessed the least seniority of all employees eligible for layoff. Thus, unlike *Teal,* where the plaintiff was affected by the discriminatory practice at the moment she was excluded from further consideration for promotion, Massarsky was not adversely affected until his low seniority identified him for layoff when in-plant force reductions became necessary.

The plaintiff maintains that General Motors offered no business justification for its discriminatory policy under the "reasonable factor other than age" exception set forth in section 623(b) of the ADEA. But because the plaintiff failed to make the prima facie showing of discrimination necessary to establish a violation of the ADEA under the disparate impact theory, the Company never became

obligated to defend its practice. The ADEA does not preclude employers from adopting arbitrary or unreasonable employment practices, except when such practices involve discrimination against protected older individuals. The practices in the instant case were not shown to have any discriminatory impact, thus there was no need to justify them.[19] *See EEOC v. Greyhound Lines, Inc.*, 635 F.2d 188, 191 (3d Cir. 1980).

Thus, Massarsky's contention that he was entitled to judgment as a matter of law on his claim of discriminatory layoff is not correct. He has not shown that the district court erred in denying his post-trial motions.

C. THE FAILURE TO RECALL

Massarsky also contends that General Motors violated the ADEA by its conduct in assigning GMI students to openings in the process engineering department rather than recalling Massarsky, who had a greater length of service with the Company than the GMI students.

On this issue too, Massarsky had the burden to prove a prima facie case of age discrimination in not recalling him. The district court held that the plaintiff met his initial burden with proof that between 1971 and 1976 four younger persons (Biondo, Glass, Mihelc, and Schultz) were promoted to open positions in the process engineering department and Massarsky was not recalled to fill one of those positions. The Company's explanation for its

[19] The dissent repeatedly criticizes the majority for its failure to address the question whether General Motors' policy could be justified under the statutory defense for "reasonable factors other than age." Because, under the majority's view of the case, there was no discrimination in the first instance, it is unnecessary to consider whether the policy could be "saved" by the statutory defense.

failure to recall Massarsky between 1971 and 1976 was that there were no openings in the process engineering department for which a laid-off employee was eligible before the Company recalled Massarsky. This was due to General Motors' policy requiring that it first fill available positions by transferring or promoting an active employee already on the payroll. According to the Company, Massarsky was not recalled to employment before 1976 simply because of his status as an "inactive employee" during that time. Every opening that became available after Massarsky's layoff was filled by the transfer of an active employee, although of less seniority than Massarsky, pursuant to company policy.

Some of the active employees who were transferred into the department during Massarsky's five-year layoff happened to be GMI students who were considerably younger than Massarsky and enjoyed less seniority but had never been laid off because of the protective treatment accorded GMI students. Massarsky's argument is that "[d]esignation of GMI student/management trainees as active employees who are entitled to fill openings over inactive employees with greater length of service patently results in a classification which adversely affected Massarsky's employment opportunities at [General Motors] because of age."

At first blush, Massarsky's argument has a logical and reasonable appeal. There is some authority within this circuit supporting the view that when an employer fills a vacant position without recalling a laid off employee who is qualified for the job, the employer commits a new violation of the Act if the failure to recall is because of age. *See Cutright v. General Motors Corp.*, 486 F.Supp. 590, 593 (W.D.Pa.1980). *See also Franci v. Avco Corp.*, 538

F.Supp. 250, 260-61 (D.Conn.1982). But whether Massarsky's complaint is analyzed as a claim of disparate treatment or of disparate impact, he has not established any grounds for relief with respect to the failure to recall. As with the discriminatory layoff charge, the jury evidently determined that the Company's employment practices were not a pretext for intentional discrimination on the basis of age. The jury had a reasonable basis in the Company's established policy on GMI students for its conclusion that there was no unlawful discriminatory motive behind the Company's actions in not recalling Massarsky until 1976.

Nor did Massarsky carry his burden of establishing that the Company's facially neutral recall policies had a disparate impact on employees in the protected age class. Although the GMI students had a job preference over Massarsky, this was due not to Massarsky's age but entirely to his inactive status resulting from his low seniority. On this record, there is no reason to believe that individuals between 40-70 years of age predominated among employees on inactive status. Massarsky has shown only that certain company policies unfortunately had an adverse effect on him; this does not establish any unlawful conduct on the Company's part.[20]

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[20]Massarsky complains that the Company's policy of preferring active employees over inactive employees with greater service in filling job vacancies was uncommunicated. It is true that this particular aspect of the Company's employment practices was not explained in the employee handbook. But this has no significance here. Massarsky contends that because "the essential terms and conditions" of the Company's seniority system have not been publicized, the Company's discriminatory practice does not qualify for the exception in section 623(f)(2) of the ADEA for "bona fide seniority systems." But this exception, like the "reasonable factor other than age" exception, only becomes relevant once a plaintiff has shown that the employer's practices had a discriminatory impact. Massarsky has not met his burden of making such a showing.

Accordingly, we perceive no error in the district court's denial of Massarsky's motions for a directed verdict or a judgment notwithstanding the verdict.

III. THE MOTION FOR A NEW TRIAL

Massarsky also claims that the district court erred in denying his motion for a new trial. He asserts that the district court committed several errors during the course of the trial proceedings.

The plaintiff primarily contends that the trial court erred in several respects in its instructions to the jury, including the following instruction:

> The plaintiff must prove that the reason stated by the defendant, General Motors Corporation, for laying off the plaintiff, [namely] that there was an economic necessity to reduce the number of Process Engineers at the Clark facility . . . and on the basis of the plaintiff's short length of service and merit, capacity and ability, the plaintiff was a Process Engineer without whom defendant could best function is a pretext. . . . In other words, the plaintiff must prove that the reason given by the defendant for laying off Mr. Massarsky was a pretext, but that the real reason or the determinative reason was age.

Massarsky challenges this instruction on the ground that it is erroneous because it fails to make any reference to the Company's internal policy insulating GMI student trainees from layoff and includes a prejudicial reference to his "short length of service" when in fact he had a longer length of service than Biondo. He also complains that the reference to the plaintiff as "a process engineer without whom defendant could best function" constituted a misleading comparison with Biondo's work skills when in

fact no such comparison was made. These errors, plaintiff asserts, virtually amounted to a directed verdict for the defendant on the layoff issue.

We do not believe this instruction was improper. General Motors did indeed maintain that Massarsky was laid off solely on the basis of his seniority, pursuant to established company policy. The district court accurately summarized in its instructions the plaintiff's burden in a disparate treatment case to show that the employer's explanation for the employment decision is a mere pretext, and that age was a determinative factor in the decision.[21]

The failure to include in the instruction any reference to the Company's practice of exempting GMI students from layoff was not erroneous. Evidence of the existence of this policy was relevant primarily to a disparate impact claim, and because Massarsky failed to make out a prima facie case under this theory, it would have been wholly improper for the district court to instruct the jury concerning disparate impact.[22] Moreover, to the

[21]Massarsky complains that the district court's instruction was subject to the misinterpretation that plaintiff was laid off on the basis of his merit, capacity and ability. The court's instruction, however, was intended merely to list the factors that the Company maintains it considered in selecting employees for layoff, not to identify those that were determinative in the decision. Any misimpression that may unintentionally have been created was cleared up almost immediately when the court stated that "General Motors concedes that all those persons being considered for layoff were of equal merit, capacity and ability."

[22]Although our dissenting colleague severely criticizes the district judge for failing to instruct the jury according to Massarsky's wishes, we are completely sympathetic with the district court's plight. The plaintiff presented his case in such a chameleonic manner that his theory of the case appears to have changed from day to day. It was only at a very late stage that Massarsky struck upon the disparate impact

extent that the existence of a policy favoring GMI students may provide some circumstantial evidence of the employer's alleged pretext under a disparate treatment theory, we believe the district court acted sensibly in declining to single out for the jury any particular item of evidence, preferring that the jury assess on its own the evidence bearing on the Company's intent.

Similarly, with respect to the claim of a discriminatory failure to recall, plaintiff argues that the trial judge should not have instructed the jury to determine whether General Motors' explanation that prior to February 1976 "there was no open position in the Clark facility for which the plaintiff as an employee on layoff was eligible or qualified, is a pretext and that a determinative reason that he was not recalled until February 1976 was his age." But this instruction correctly summarized both the relevant law and the Company's articulated explanation for its action. It was within the district court's discretion to omit reference to the GMI student program and thereby avoid giving the jurors the impression that this evidence was particularly probative on the issue of motive.

Plaintiff also objects to the trial court's instruction that intent was a necessary element in Massarsky's case. But in a disparate treatment case – the theory on which the court submitted this case to the jury – the plaintiff must demonstrate that he has been the victim of intentional discrimination. *See Texas Department of Community Affairs v. Burdine, supra.* As for the disparate im-

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theory that he now presses upon this court. It is the plaintiff himself who is responsible for any confusion the district court may have felt in its conception of Massarsky's claim.

pact theory, where intent is not required, the court was correct, as we have shown, in not submitting this case to the jury on that theory.

Finally, Massarsky contends that it was error not to instruct the jury specifically that the existence of internal corporate policies which discriminate against protected individuals provided evidence of discrimination in the layoff of Massarsky and the subsequent failure to recall him. Such a charge, however, would have had no basis in the evidence, because Massarsky did not establish that General Motors' layoff policy discriminated against protected individuals. More important, the court did not err in concluding that it would be unwise for it to propose particular inferences that the jury might draw from the evidence. As a whole, we believe the charge to the jury was fair and free from error.[23]

IV. THE MOTION TO AMEND THE COMPLAINT

Finally, plaintiff appeals from the district court's denial on several occasions of his motions to amend his pleadings to assert a pendent state law claim under the New Jersey Law Against Discrimination (NJLAD), . N.J.S.A. §§ 10:5-1 et seq. (1976). This allegation focuses on the district court's interpretation of the time limits contained in the New Jersey statute and the retroactive effect of a recent amendment to that provision.

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[23]Massarsky also objects to numerous rulings by the district court excluding certain evidence dealing with the General Motors retirement program. The plaintiff has not met his burden of showing that the court's evidentiary rulings were "inconsistent with substantial justice" under Fed.R.Civ.P. 61. As to Massarsky's assertion that the jury's verdict against him was against the weight of the evidence, we reject this contention as it is without merit.

Amendments, although liberally granted, rest within the sound discretion of the trial court under Fed.R. Civ.P. 15. The trial court may properly deny leave to amend where the amendment would not withstand a motion to dismiss. The Company contends that the inclusion of a claim under NJLAD would have been futile because the claim under that Act would have been subject to dismissal as time-barred. We need not decide that question, however, because the trial judge believed, as stated in his bench opinion denying plaintiff's post-trial motions, that "[t]he elements of the NJLAD are the same as for ADEA" and the court "cannot conceive that the jury would have found for plaintiff on this claim in view of its findings on the federal claim." We perceive no error in the construction of the New Jersey statute and in the court's denial of the motions to amend.

V.

The judgment of the district court will be affirmed.

SLOVITER, Circuit Judge, dissenting.

When, in 1967, Congress originally addressed the serious social problem of age discrimination in employment, it did so because "older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs"; because "certain otherwise desirable practices may work to the disadvantage of older persons"; and because "the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave." Age Discrimination in Employment Act of 1967

[hereinafter ADEA], Pub.L. No. 90-202, § 2(a)(1)-(3), 81 Stat. 602 (codified at 29 U.S.C. § 621(a)(1)-(3)). The purpose of the Age Discrimination in Employment Act was, *inter alia*, "to promote employment of older persons based on their ability rather than age." *Id.* § 2(b), 29 U.S.C. § 621(b).

William Massarsky, a senior process engineer in General Motor's [sic] New Departure-Hyatt Bearings Division, had seven years seniority when he was laid off on February 28, 1971. He was not recalled until February 27, 1976, after the present lawsuit had been instituted. He was 48 years old at the time of the layoff. It is undisputed that GM chose to lay off Massarsky rather than a work study student from the General Motors Institute, who was assigned to Massarsky's department and paid out of the departmental budget, because of a GM policy not to lay off GMI students and to guarantee them the opportunity to complete their degrees.[1] Massarsky remained on layoff status for five years. It is undisputed that he was not recalled to work earlier because at least three additional GMI students were assigned to Massarsky's department after they graduated pursuant to a GM policy which classified GMI students as active employees upon their graduation, and gave them preference over inactive employees such as Massarsky.[2] Thus, Massarsky claims violation of the statute both for his initial layoff and the failure to recall.

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[1] As GM concedes in its brief, "the retention of Biondo was pursuant to GM policy that GMI students are not subject to layoff." Brief for GM as Appellee at 12.

[2] GM explains the failure to recall Massarsky on the ground that "active employees already on the payroll – e.g. Biondo, Glass, Mihelc, and Schultz [all recent GMI graduates] – were promoted into available positions in the process engineering department during [the time Massarsky was on lay off]." Brief for GM as Appellee at 12.

Massarsky was admittedly within the protected age group for whom the ADEA was enacted.[3] Massarsky proved at trial that each of the GMI students who was favored over him was between 22 and 25 years old. Dr. William B. Cottingham, President of the General Motors Institute, testified that "the age makeup of our typical class is primarily in the eighteen to twenty category because we recruit primarily at high schools for our classes." Transcript of October 1, 1981 at 154. Thus, it is an ineluctable conclusion that those in the favored class, GMI students, were below 40. GM does not contend otherwise.[4]

Nonetheless, the majority finds no age discrimination in the GM policies which, by their very nature, favor younger workers over older workers. It reaches its improbable conclusion first, by holding that a showing of intent to discriminate, over and above the establishment of and adherence to the patently discriminatory policies at issue in this case, is necessary for the disparate treatment claim, and second, by holding that evidence that the policies favored the group of younger workers and had an adverse impact on Massarsky, an older worker, is insufficient to establish the disparate impact claim. I believe the majority errs in both respects. Furthermore, the majority fails to

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[3]The ADEA originally defined the protected older worker as one between 40 and 65 years of age. ADEA, § 12, 81 Stat. at 607. It later was amended to raise the upper age limit to 70, Age Discrimination in Employment Act Amendments of 1978, Pub.L. No. 95-256, § 3(a), 92 Stat. 189 (codified as amended at 29 U.S.C. § 631(a) (Supp. V 1981)).

[4]Although the majority suggests such a conclusion is dehors the record, it cannot seriously believe high school graduating classes are composed of persons over 40, particularly when the GMI President defined the GMI class makeup in the 18 or 20 year old category. Even if there were an occasional over 40 graduate, the GMI student population would be overwhelmingly below 40, and the legal analysis would be the same.

examine whether the GM policies qualify for the ADEA statutory defense of "differentiation. . . based on reasonable factors other than age", 29 U.S.C. § 623(f)(1), and fails to discuss how these GM policies can qualify as a legitimate, nondiscriminatory reason or as justified by business necessity. Finally, the majority affirms the district court's rather remarkable decision declining to instruct the jury on the heart of plaintiff's case, his claim that these policies either on their face or by their inescapable effect favor younger workers over older workers.

I.

DISCRIMINATORY TREATMENT

A.

Massarsky's Layoff

As in our recent case of *Wilmore v. City of Wilmington*, 699 F.2d 667 (3d Cir. 1983), this case involves the interweaving of the two separate legal theories of liability used in employment discrimination cases, one predicated on discriminatory treatment and the other predicated on disparate impact. This case differs somewhat from the traditional discriminatory treatment case. Ordinarily, discriminatory or disparate treatment claims challenge discrete action directed against a single individual, such as discharge or discipline allegedly due to race, sex, or age, *see, e.g., Worthy v. United States Steel Corp.*, 616 F.2d 698 (3d Cir. 1980), or failure to provide certain advantages or services to a member of one group which were provided to members of the favored group, *see, e.g., Kunda v. Muhlenberg College*, 621 F.2d 532 (3d Cir. 1980). Here,

however, plaintiff does not claim that he, as an individual, was singled out for disparate treatment. Instead he claims that the GM policies which were applied to him resulted in disfavoring him as an older worker and favoring GMI students, who were younger workers.

In employment discrimination cases, claims of unfavorable employment practices resulting from an employer's policy have ordinarily been considered under disparate impact analysis. That analysis, as it evolved from *Griggs v. Duke Power Co.*, 401 U.S. 424, 91 S.Ct. 849, 28 L.Ed.2d 158 (1971), is directed to facially neutral policies which have a disparate impact on a particular race, sex or age group. Where the employment policy or practice is not facially neutral, it is considered discriminatory treatment. Although an intent to discriminate is a necessary ingredient of a discriminatory treatment case, the Supreme Court has never required or suggested that plaintiffs who have proven a facially discriminatory policy must make a separate showing of intentional discrimination. Thus in *City of Los Angeles Department of Water & Power v. Manhart*, 435 U.S. 702, 98 S.Ct. 1370, 55 L.Ed.2d 657 (1978), the Court held that a requirement that female employees contribute more to a pension fund than male employees constituted discriminatory treatment, without any intimation that there was a need to make a separate finding of intent to discriminate. Indeed, an intent to discriminate in the sense used by the majority in this case as "motivated by any discriminatory animus," Majority op. at 118, was patently absent in *Manhart* since the unequal pension contributions had been established because women as a group do in fact live longer than men. Similarly, in *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 91 S.Ct. 496, 27 L.Ed.2d

613 (1971) (per curiam), the Court held an employment policy refusing to hire women with preschool-age children constituted discriminatory treatment notwithstanding the fact that "no question of bias against women as such was presented." *Id.* at 543, 91 S.Ct. at 497. It remanded for consideration whether the employer could satisfy the statutory bona fide occupational qualification defense, but significantly did not remand so that the employer could show absence of intent to discriminate. In cases of facially discriminatory policy, the policy itself establishes the intent necessary to show discriminatory intent.

If GM had a policy that it would only hire applicants who were less than 40 years old, I assume we would hold that this facially discriminatory policy showed discriminatory treatment as a matter of law and would not submit to the jury the issue of intentional discrimination. There might be a jury issue on whether a statutory defense applied, but not on whether plaintiff had satisfied the requirement to show intentional discrimination. As in the Title VII cases, intent would be supplied by the policy itself. Similarly, if GM had a policy that it would insulate employees under 40 years of age from any layoff, again there would be no intentional discrimination issue to submit to the jury. Should this legal principle change merely because GM framed its policy in terms of favoring GMI students (who were all under 40) rather than in terms of favoring them qua their age? If a statute were directed at roses, and a grower described its flower as a fragrant multipetaled red bloom grown on a branch with thorns, is the flower any less a rose? Gertrude Stein would have rejected that suggestion with dispatch.

In some circumstances, there might be a jury issue as to whether a policy similar to GM's policy was discriminatory. In this case because the testimony of the GMI president concedes, and GM does not deny, that the GMI student group was exclusively under 40 years of age, *see* note 4 *supra*, the GM policy should be treated as facially discriminatory and there was no issue of intentional discrimination to submit to the jury. The focus of the majority's opinion should have been on whether GM has any defense or justification for that policy.

Instead of analyzing along this route, the majority predicates its analysis on the language from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973), establishing a presumption which assists plaintiffs in making out a prima facie disparate treatment case. The order and allocation of proof referred to in *McDonnell Douglas* has little applicability in this case. The prima facie case recognized in *McDonnell Douglas* is useful for those plaintiffs who have difficulty finding direct evidence of discrimination. There is no indication in that opinion or its progeny that it establishes the exclusive method of proving discriminatory treatment. Direct evidence of discrimination obviously would suffice. Similarly, a facially discriminatory policy satisfies the requisite proof.

It is inconsistent for the majority to acknowledge that Massarsky established a prima facie case on his disparate treatment claim, but to conclude that Massarsky failed to show intentional discrimination. The intent to discriminate is presumed from the establishment of that prima facie case unless GM articulated a "legitimate, *nondiscriminatory* reason" for the layoff. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 254, 101

S.Ct. 1089, 1094, 67 L.Ed.2d 207 (1981) (emphasis added). This has just been reaffirmed by a unanimous Court in *United States Postal Service Board of Governors v. Aikens*, ___ U.S. ___, ___, 103 S.Ct. 1478, ___, 74 L.Ed.2d ___ (1983). The majority never adequately discusses whether GM did so.

B.

Failure to Recall

Massarsky's discriminatory treatment claim on the failure to recall should be analyzed in the same way as his layoff claim. Recall of laid off GM employees was on the basis of seniority, all other factors being equal. Massarsky waited five years for recall while GMI graduates with shorter service were reassigned upon graduation or promoted to fill openings in his department which Massarsky could have filled. GM justified this practice on its corporate policy to fill open positions with active employees before recalling laid off employees. Massarsky's challenge is not directed to that policy as such but to GM's policy to designate GMI graduates as active employees. Under that classification, GMI students are, upon graduation, entitled to preference in filling openings over inactive employees, notwithstanding their shorter service.

Massarsky has shown that GM's classification policy designating graduates as active employees resulted in the failure to recall him. Several GMI students were assigned to Massarsky's department after they graduated – Mihlec, age 23 (8/20/73); Morella, age 22 (2/1/76); and Ziegler, age 22 (2/1/76) – while he remained on layoff status. During this same period, Biondo, age 25, and Schultz, age 23, students previously assigned to that

department, were reclassified upon graduation and filled positions which Massarsky could have filled. It was only after one of these younger employees with less seniority left GM that Massarsky was recalled.

Again, the majority holds that Massarsky failed to show discriminatory treatment in the failure to recall, by stating that "[a]s with the discriminatory layoff charge, the jury evidently determined that the Company's employment practices were not a pretext for intentional discrimination on the basis of age." Majority op. at 123. However, as developed above, when, as in this case, it is uncontested that GMI students are younger workers, a policy which classifies them as active workers upon graduation is facially discriminatory and carries with it a necessary finding of intentional discrimination. The central issue whether the policy of classification of GMI graduates as active employees could be justified under a statutory defense is never reached by the majority.

II.

DISPARATE IMPACT

A.

Massarsky's Layoff

The analysis which I believe appropriate for Massarsky's disparate treatment claims is based on equating GM's policies on GMI students and recent graduates with policies explicitly framed in terms of employees under 40 years of age. As noted in Part I, since GM has not contested that this favored group is exclusively under 40, I believe the relevant policies must be treated as facially discriminatory. If, however, we treat these policies as facially neutral, as the majority does, then the

applicable analysis is that developed under the disparate impact theory. Plaintiff would be entitled to show that even in the absence of intentional discrimination, these policies favored younger workers and had an adverse impact on him.

Preliminarily, I find the majority's reluctance to decide that disparate impact analysis is appropriate for an ADEA claim surprising. As the Supreme Court recognized, "the [substantive] prohibitions of the ADEA were derived in *haec verba* from Title VII." *Lorillard v. Pons,* 434 U.S. 575, 584, 98 S.Ct. 866, 872, 55 L.Ed.2d 40 (1978). The Second Circuit has held disparate impact analysis should be applied to an ADEA claim. *Geller v. Markham,* 635 F.2d 1027, 1032 (2d Cir. 1980), *cert. denied,* 451 U.S. 945, 101 S.Ct. 2028, 68 L.Ed.2d 332 (1981). We should do the same. *Cf. NAACP v. Medical Center, Inc.,* 657 F.2d 1322, 1331 (3d Cir. 1981) (in banc) [sic] (disparate impact analysis applicable to the Age Discrimination Act of 1975, 42 U.S.C. §§ 6101 *et seq.*).

The district court, for reasons which were never fully explained, visualized the case as a disparate treatment case only. Over plaintiff's objection, the court rejected plaintiff's contention that the case should be considered and submitted to the jury on a disparate impact theory. *See, e.g.,* Transcript of October 5, 1981 at 6.28 (charging conference). In doing so, the district court distorted plaintiff's claim. Plaintiff's counsel explained to the court that plaintiff did not claim that GM "went after Mr. Massarsky personally because of his age." *Id.* Instead, it was plaintiff's claim that "it was the implementation of the overall policy through the personnel director that was involved that resulted in the impact on him because of his age." *Id.* at 6.29.

Since the trial court either misconceived or mischaracterized plaintiff's claim, it never dealt frontally with plaintiff's disparate impact theory, either in the opinion on judgment n.o.v. or in submitting the case to the jury. The majority affirms, apparently concluding that the district court's error was irrelevant because it believes that Massarsky failed to establish a prima facie case on disparate impact. Although the trial court never reached the issue, the majority finds Massarsky's disparate impact claim was inadequate because he failed to show "that the employer's selection process results in unfavorable treatment of a disproportionate number of members of the protected group to which the plaintiff belongs." Majority op. at 120.

As noted above, plaintiff has shown that the GM policy established a favored class, composed of younger employees, an age based classification. In most cases challenging age based classifications, the composition of the favored class is not as starkly apparent as in this case. Nonetheless, the courts have recognized the discriminatory impact of the policy. For example, in *Geller v. Markham, supra,* the court considered the district court's holding that a school board's policy to recruit new teachers at levels below the sixth step of the salary schedule, reached by teachers with more than five years experience, was *discriminatory as a matter of law* because 92.6% of all teachers over 40 years of age would have reached that "sixth step" cutoff. Even though a majority of teachers *under* 40 *also* had reached the "sixth step", the Second Circuit agreed "that the high correlation between experience and membership in the protected age group (40 to 65 years of age) would render application of the 'sixth step' policy discriminatory as a matter of law." 635 F.2d at 1033. Because the policy made it substantially

less likely that a person over 40 would be selected, it was unlawful. The *Geller* court found it decisive that an overwhelming percent of the protected class was in the disfavored group. The record in this case supports an even stronger finding, *i.e.*, that virtually 100% of the protected class is in the disfavored group because the favored student group is under 40. As in *Geller,* the fact that the policy may also disfavor laid off workers under 40 does not overcome the discriminatory impact on the protected class.

The majority's holding that it was not enough for Massarsky to prove an impact on Massarsky alone ignores the directly applicable language in *Connecticut v. Teal,* ____ U.S. ____, 102 S.Ct. 2525, 73 L.Ed.2d 130 (1982). There, Justice Brennan, writing for the Court, rejected the claim that there was no violation of Title VII because other employees in the protected group were favorably treated. The Court stated: "It is clear that Congress never intended to give an employer license to discriminate against some employees on the basis of race or sex merely because he favorably treats other members of the employees' group." *Id.* 102 S.Ct. at 2535. Justice Brennan made explicit that the focus on the individual adversely affected by the employer's policy or action should be applied in all Title VII cases, whether brought under the discriminatory treatment theory or under the disparate impact theory.

> The fact remains . . . that irrespective of the form taken by the discriminatory practice, an employer's treatment of other members of the plaintiffs' group can be "of little comfort to the victims of . . . discrimination." *Teamsters v. United States, supra,* 431 U.S., at 342, 97 S.Ct.,

> at 1858. Title VII does not permit the victim of a facially discriminatory policy to be told that he has not been wronged because other persons of his or her race or sex were hired. That answer is no more satisfactory when it is given to victims of a policy that is facially neutral but practically discriminatory. Every *individual* employee is protected against both discriminatory treatment and against "practices that are fair in form, but discriminatory in operation."

Id. See also Spirt v. Teachers Insurance & Annuity Association, 691 F.2d 1054, 1061-62 (2d Cir. 1982).

Justice Brennan predicated his interpretation of Title VII on the legislative policy and statutory language which precludes *"limitations* and *classifications* that would deprive any individual of employment *opportunities." Connecticut v. Teal,* 102 S.Ct. at 2531 (emphasis in original). The ADEA shows the same concern for the individual employee. Its prohibition is *in haec verba* with that of Title VII on which the Court relied. It makes it unlawful "to limit, segregate, or classify. . . employees in any way which would deprive or tend to deprive *any individual* of employment opportunities . . . because of such individual's age," 29 U.S.C. § 623(a)(2) (emphasis added). No reason is suggested why the analysis of *Connecticut v. Teal* is not equally applicable to an ADEA case. In the Court's recent opinion in *EEOC v. Wyoming,* ____ U.S. ____, ____, 103 S.Ct. 1054, 1058, 74 L.Ed.2d ____ (1983), it stated that the ADEA "emphasized both the individual and social costs of age discrimination." As the Court noted, this statute was predicated on the finding that age discrimination "inflicted on individual workers the economic and psychologica' injury accompanying the

loss of the opportunity to engage in productive and satisfying occupations." *Id.*

The majority's attempt to distinguish *Teal* on the somewhat circular statement that Massarsky was selected for layoff because "he possessed the least seniority of all employees *eligible for layoff*", Majority op. at 122 (emphasis added), ignores the critical fact that Massarsky had the least seniority only because a less senior employee was insulated as a result of the policy at issue. The majority had earlier in its opinion recognized that Massarsky "did, of course, show that the challenged employment practices of General Motors had a pernicious effect on him," Majority op. at 121. After the decision in *Connecticut v. Teal*, the majority cannot take refuge in the assumption that Massarsky was an anomaly and that the layoff would ordinarily fall on employees too young to be protected under the ADEA. *See* Majority op. at 120-121. By relying on the weight ordinarily given to seniority which might counterbalance the challenged policy, the majority is adopting a "bottom line" analysis discredited in *Connecticut v. Teal*. As the First Circuit recently noted, *Teal* requires analysis at the "point at which the employer's neutral criterion has a discriminatory effect. The Court's focus must be on the first step in the employment process that produces an adverse impact . . . [here the insulation of students from layoff], not the end result of the employment process as a whole." *Costa v. Markey*, 694 F.2d 876, 880 (1st Cir. 1982).

Thus, Massarsky established a prima facie case of disparate impact by showing that the policy to retain students, even if not facially discriminatory, in effect preferred younger employees, and was the reason for his layoff.

B.

Failure to Recall

In my view, the legal principles set forth above should also govern application of the disparate impact theory to GM's policy classifying GMI students as active employees who, upon graduation, were entitled to fill openings before Massarsky, an older worker, was recalled. Massarsky has shown that this favored group, recent GMI graduates, was younger than 40. He has also shown that he was not recalled while these younger recent GMI graduates were assigned, in preference to him, to the openings in his department. Thereby, he established a prima facie case. It was, then, incumbent upon GM to establish a defense or articulate a legally adequate justification.

III.

JUSTIFICATION FOR GM'S POLICIES

I believe that the preceding analysis demonstrates that Massarsky established a violation of the ADEA for both the layoff and the failure to recall under the discriminatory treatment theory. As developed above, there was no factual issue as to the composition of the favored groups and hence the policies must be treated as facially discriminatory. It is obvious that a facially discriminatory policy cannot serve as a legitimate *non-discriminatory* reason; hence we need not engage in the *McDonnell Douglas* analysis. Because intent to discriminate was supplied by the establishment and implementation of the challenged policies, no jury issue other than a potential defense was presented on disparate treatment.

Massarsky established a prima facie case of disparate impact by the evidence that the policies favored groups of younger persons and had an adverse impact on him. In order to rebut that prima facie case, it was incumbent on GM to articulate the business necessity for these policies, business necessity serving in disparate impact cases as the analog of the articulation of a legitimate non-discriminatory reason in disparate treatment cases. GM has not claimed business necessity for its policies.

It remains to consider whether GM has proven that it falls within the only statutory defense on which it relies – that the differentiations created by the policies are based on "reasonable factors other than age." 29 U.S.C. § 623(f)(1). Massarsky claims that as a matter of law, GM cannot defend this age discrimination claim on corporate policies which are themselves discriminatory as favoring younger workers. Therefore, he argues, he was entitled to judgment n.o.v. He contends that even if we do not agree with his per se illegality analysis, he was at least entitled to jury instructions under which the jury would determine whether these corporate policies could be justified. GM's presentation to this court and the majority's opinion fail to focus on whether GM's policies could be considered as legally justified.

A.

The Per Se Analysis

Massarsky's Motion for judgment n.o.v. was based on his per se analysis. Even if a plaintiff shows discriminatory treatment or disparate impact, an employer may avert liability by proving a statutory defense. The only statutory defense asserted by GM was that of "reasonable factors other than age." GM's position appears to be that because

it treated Massarsky on the basis of its policies, it did not violate the statute.

The language of the provision permitting "differentiation . . . based on reasonable factors other than age" suggests that the defense is a mirror image of the offense itself. In other words, if the employer proves that the treatment of the employee was based on a reasonable factor other than age, then there has been no age discrimination. Accordingly, an employment policy which by definition favors one age group cannot be a "reasonable facto[r] other than age" although it might be a "bona fide occupational qualification" which concedes the age based discrimination but asserts the affirmative defense that substantially all of a given class would be unable to perform the job. *See, e.g., Marshall v. Westinghouse Electric Corp.*, 576 F.2d 588, 591 (5th Cir. 1978). GM does not seek to bring itself within the BFOQ defense.

There is much to commend this interpretation of the statutory defense of "reasonable factors other than age." As the original interpretive regulations issued by the Department of Labor recognized, "To classify or group employees solely on the basis of age . . . for any . . . purpose, necessarily rests on the assumption that the age factor alone may be used to justify a differentiation – an assumption plainly contrary to the terms of the Act and the purpose of Congress in enacting it. Differentials so based would serve only to perpetuate and promote the very discrimination at which the Act is directed." 29 C.F.R. § 860.103(h) (1982). The EEOC, now responsible for enforcement of the ADEA, has taken a similar position. Its regulations state, "When an employment practice uses age as a limiting criterion, the defense that the practice is justified by a reasonable factor other than age is unavailable." 29 C.F.R. § 1625.7(c) (1982).

In discriminatory treatment cases, the "reasonable factors" defense will in large measure overlap the legitimate, nondiscriminatory reason which defendant must articulate to rebut intent to discriminate. Similarly, in disparate impact cases, the "reasonable factors" defense will overlap the business necessity upon which defendant must rely if it is to rebut plaintiff's prima facie case. *See* 29 C.F.R. § 1625.7(d) (1982) (when claimed reasonable factor is an employment practice which "has an adverse impact on individuals within the protected age group, it can only be justified as a business necessity"). In such cases, the "reason able factors" must be justified as job related, such as physical fitness requirements reasonably necessary for the specific work, evaluation factors such as education or quality of production where validly related to job requirements, and employee tests specifically related to job requirements. 29 C.F.R. § 860.103.-104 (1982). *See also Laugesen v. Anaconda Co.*, 510 F.2d 307, 315 (6th Cir. 1975) (job related showing required when purported "reasonable factor" is a policy that may have a disparate impact upon older workers). GM never claimed that its policies were job related or that GMI students were, as a class, better suited to the work. Since age based differentiations cannot be "reasonable factors other than age," and since GM never even proffered a job related justification for its policies, no jury question was presented under either a disparate treatment or impact theory.

The majority assumes it is sufficient if GM merely followed its policy, and never examines whether that policy is, in itself, discriminatory. However, in *Griggs v. Duke Power Co.*, the Court stated that the employer could not rely on its policy requiring a high school education or passing of a standardized general intelligence test unless these prerequisites were shown to be significantly related

to successful job performance. 401 U.S. at 431, 436, 91 S.Ct. at 853, 856. As this court stated in applying a similar discrimination statute, "If the defendant presents no evidence of business relatedness in his case, the court may assume that there was no permissible reason for the impact." *NAACP v. Medical Center, Inc.*, 657 F.2d at 1334. Since GM did not attempt to show any job relatedness, and apparently takes the erroneous position that it was not required to do so, I believe Massarsky was entitled to judgment n.o.v. on liability.

B.

Jury Instructions

Even if we do not treat GM's policies as discriminatory *per se*, those policies could serve as evidence of an intent to discriminate. Similarly, even if we liberally construe this record to assume that GM relied on a business necessity justification, that justification should have been presented to the jury. For reasons which are incomprehensible to me, the district court never instructed the jury on either of these issues.

Massarsky made clear throughout the litigation that he based his ADEA claim on the policies which favored GMI students and graduates. Indeed, the district court's order reinstating Massarsky's federal age discrimination claims reflected an agreement between counsel that the factual basis for Massarsky's ADEA claims would be limited to:

> the circumstances surrounding the alleged permanent placement or hiring of *certain General Motors Institute 'students'*, specifically Joseph Biondo, Arthur Glass, William Mihelc, Gary

> Schultz, Robert Morella, Harry Ziegler, Jr., Alan Munkascy and Stephen Kienzle, at the Clark plant of the Hyatt Division during the period February 1971 through February 1976.

Joint Appendix at 114 (emphasis added).

Massarsky adequately preserved his objection to the district court's failure to refer at any point in its jury charge to GM's policies on GMI students and graduates and Massarsky's claim that those policies were discriminatory. His counsel vigorously objected at the charging conference to the district court's failure to make any mention of the relevant policies. *See* Transcript of Conference of October 2, 1981 at 136-40. The court's charge that Massarsky had to prove intent to discriminate (which as noted above was erroneous since intent was supplied by the policy itself) and that GM claimed the layoff resulted from an economic necessity to reduce the number of process engineers (a conceded fact which skirted the central issue) failed to direct the jury's attention to the heart of plaintiff's case. The district court declined to tell the jury that GM had admittedly based its actions on its internal policies and refused to instruct the jury to consider whether those policies were justified because the district court believed that such instructions would be "[p]ractically a directed verdict" and therefore "prejudicial to the defendants." *Id.* at 139. The reason given is insufficient. If such a charge in effect amounted to a "directed verdict", that would only have been because of GM's failure to show any justification for its policies.

In *Geller v. Markham, supra,* the trial court instructed the jury that the "sixth step" policy for hiring teachers was discriminatory on the basis of age as a matter of law, and submitted to the jury only the question whether the policy

had been applied to plaintiff. 635 F.2d at 1031. Here GM conceded that the policies were applied to Massarsky.

The inescapable obligation of the trial court in a jury trial is to explain the legal issues to the jury, instructing the jurors on the appropriate legal principles in language they can understand. *See, e.g., Lind v. Aetna Casualty & Surety Co.*, 374 F.2d 377, 380 (5th Cir. 1967); 9 C. Wright & A. Miller, *Federal Practice and Procedure* § 2556 (1971). The trial court must instruct the jury in accord with a party's contention if it is consistent with the evidence in the case. *See Richardson v. Walsh Construction Co.*, 334 F.2d 334, 338 (3d Cir. 1964). As long as a century ago, this court stated, "It is error for the court to submit the evidence and theory of one party prominently and fully to the jury and not call their attention to the main points of the opposite party's case." *Weiss v. Bethlehem Iron Co.*, 88 F. 23, 30 (3d Cir. 1898) (Acheson, J.), *appeal after remand*, 100 F. 45 (1900), *cert. denied*, 176 U.S. 685, 20 S.Ct. 1027, 44 L.Ed. 638 (1900). The fact that this is an "old" citation does not detract from its correctness or force. In failing to present to the jury the plaintiff's primary contention, the trial court emasculated plaintiff's case. I believe this constituted reversible error.

In Title VII cases, unlike ADEA cases, the court serves as the factfinder. Thus, in the Supreme Court's recent *Aikens* opinion, it noted that the factfinder, there the district court, "must decide which party's explanation of the employer's motivation it believes." *Aikens*, ____ U.S. at ____, 103 S.Ct. at ____. In this case the factfinder, *i.e.*, the jury, was never instructed on plaintiff's explanation of the reason for employer's action, since the trial court ignored the issue of the policy insulating GMI students and graduates.

It may be that Massarsky's claim has received somewhat less than sympathetic treatment by the trial judge and the majority because of their belief that it was reasonable for GM to provide a work study opportunity for GMI students so they could graduate. GM could have accomplished this goal without charging the students to the department's payroll and casting them in competition with older employees. In some plants, for example, General Motors has placed GMI students on personnel or training budgets when departmental slots were unavailable. *See Williams v. General Motors Corp.*, 656 F.2d 120, 123 (5th Cir. 1981), *cert. denied*, 455 U.S. 943, 102 S.Ct. 1439, 71 L.Ed.2d 655 (1982). In any event a goal to protect GMI students until graduation cannot justify classification of GMI graduates as active employees and assigning them to open positions in preference to Massarsky, a laid off employee with more seniority. Significantly, GM never sought to justify its policies on any need to train a supply of new personnel. Had it done so, plaintiff would have had the opportunity to rebut that claim, and to show that a feasible, yet less onerous alternative existed. *See NAACP v. Medical Center, Inc.*, 657 F.2d at 1335.

We must not overlook that Congress considered but rejected an exemption for management training programs when it enacted the ADEA. As explained in the House Report accompanying the original bill:

> The committee also considered a suggestion that section 4(f) be amended to specifically allow for a bona fide management training program. . . .
>
> *The committee declined to incorporate a specific exception for management training programs since it was believed so broad an exemp-*

> *tion in the law might open a very wide door of possible abuse.* Almost any training, or opportunity for acquiring experience on a job, might be construed as leading to future advancement to management positions.

H.R.Rep. No. 805, 90th Cong., 1st Sess. 4, *reprinted in* 1967 U.S.Code Cong. & Ad. News 2213, 2217 (emphasis added).

There may be some unavoidable instances where the ADEA's protection of the older worker has a countervailing impact on another worthy policy. The majority may be suggesting as much in its otherwise unexplained reference to the fact that the GMI population contains a significant number of minority and female students. However, GM did not seek to justify its policies on the need to train members of groups whom it may have previously neglected. Nor did it seek to justify its policies on any business necessity. GM chose to stand mute on the rationale for its corporate policies. However, as the internal memorandum quoted by the majority makes clear, GM's interest appeared to be in protecting its "considerable investment in these [GMI] students," Majority op. at 119, rather than a social policy of advancing minorities or women.

As I have indicated, I believe the appropriate disposition of this case, given GM's failure to explain or justify its policies, is to reverse and direct judgment n.o.v. At a minimum, Massarsky is entitled to a remand for a new trial with proper jury instructions. I dissent from the majority's affirmance.

APPENDIX B

DENIAL OF PETITION FOR REHEARING

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5176 and 82-5177

WILLIAM MASSARSKY and
GERTRUDE MASSARSKY, his wife,
Appellants in No. 82-5176

v.

GENERAL MOTORS CORPORATION,
a corporation of the State of Delaware,
Appellant in No. 82-5177

SUR PETITION FOR REHEARING
Present GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER,
Circuit Judges

The petition for rehearing filed by

WILLIAM MASSARSKY and GERTRUDE MASSARSKY, his wife, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge

who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc [sic], the petition for rehearing is denied.

Judges Gibbons, Sloviter and Becker dissent from denial of rehearing for reasons expressed in Judge Sloviter's dissent.

By the Court,

/s/

Judge

Dated: May 11 1983

APPENDIX C

DENIAL OF PETITION FOR REHEARING AMENDED ORDER

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 82-5176 and 82-5177

WILLIAM MASSARSKY and
GERTRUDE MASSARSKY, his wife,
Appellants in No. 82-5176

v.

GENERAL MOTORS CORPORATION,
a corporation of the State of Delaware,
Appellant in No. 82-5177.

AMENDED ORDER SUR PETITION FOR REHEARING
Present GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM, SLOVITER, BECKER,
Circuit Judges

The petition for rehearing filed by

WILLIAM MASSARSKY and GERTRUDE MASSARSKY, his wife, in the above entitled case having been submitted to the judges who participated in the deci-

sion of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc [sic], the petition for rehearing is denied.

Judges Gibbons and Sloviter dissent from denial of re-rehearing for reasons expressed in Judge Sloviter's dissent. Judge Becker would grant rehearing.

By the Court,

/s/

Judge

Dated: May 16 1983

APPENDIX D

BENCH OPINION

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY
Civil Action No. 75-1489

WILLIAM MASSARSKY and GERTRUDE MASSARSKY, his wife, Plaintiffs,	:	
v.	:	BENCH
	:	OPINION
GENERAL MOTORS CORPORATION, a corporation of the State of Delaware, Defendant.	:	

December 21, 1981
Newark, New Jersey

BEFORE:

THE HONORABLE H. LEE SAROKIN, U.S.D.J.

WILLIAM SOKOL, C.S.R.
Official Court Reporter

THE COURT: Motion of Plaintiff for Judgment N.O.V. or for a new trial, and to amend the pleadings.

This case was tried before a jury from September 22 to October 6, 1981. On October 6 the jury returned a verdict

for defendant, and pursuant to that verdict the Court entered a judgment on October 8, 1981 in favor of the defendant on all claims. Plaintiff had timely moved for a directed verdict, and now renews his motion in the form of a motion for judgment notwithstanding the verdict. He also moves to amend the pleadings to include a claim under the New Jersey Law Against Discrimination (the "NJLAD").

Plaintiff had claimed at trial that General Motors was guilty of violation of the Age Discrimination in Employment Act of 1967 (the "ADEA"), 29 U.S.C. Section 621 et seq., when it laid off plaintiff in 1971 and again when it failed to recall him prior to 1976. In addition, plaintiff claimed that GM was liable for fraud because it misrepresented to plaintiff the reasons for which he was laid off and the conditions of his recall. These claims underwent prolonged and intensive discovery and pretrial process of more than five years, before the issues finally came to trial. Several of the original claims alleged were abandoned.

A motion for judgment n.o.v. is governed by Fed. R. Civ. P. 50(b). A prerequisite under the rule is that the party have made a motion for a directed verdict, and the standard is the same for either motion. See 5A Moore's Federal Practice Paragraph 50.07(2) (Supp. 1980). "In considering a motion for judgment n.o.v. the Court must view the evidence in the light most favorable to the party who secured the jury verdict." *Eastern Associated Coal Corp. v. Aetna Cas. & Surety Co.*, 632 F.2d 1068, 1074 (3d Cir. 1980), cert. denied [sic] 101 S.Ct. 2320 (1981). The motion should be granted "only if the evidence is so overwhelmingly in favor of the movant as to admit of no other reasonable conclusion." *Derr v. Safeway Stores, Inc.*, 404

F.2d 634, 636 (10th Cir. 1968). The Court is not permitted to consider the credibility or weight of the evidence, and any conflicting evidence is sufficient to preclude a judgment n.o.v. *Fireman's Fund Ins. Co. v. Videfreeze Corp.*, 540 F.2d 1171, 1178 (3d Cir. 1976).

In an ADEA case, the plaintiff must first prove a *prima facie* case of age discrimination; the defendant must articulate a legitimate, non-discriminatory reason for its action; and the plaintiff must respond by proving that the reason articulated is a pretext for age discrimination. *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (a Title VII case); *Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980) (holding Title VII standards on burdens of proof applicable to ADEA actions). The burden of persuasion never shifts, and remains with the plaintiff at all times.

In the present case, plaintiff proved his *prima facie* case. He is within the protected group; he was laid off; and younger people were not. Defendant also carried its burden of production and articulated a nondiscriminatory reason. The younger workers were enrolled students at the General Motors Institute, an accredited college, and it was company policy not to lay off such students until they graduated. GMI has a work-study program through which students spend a part of the year employed in various capacities by GM, and it was in this connection that the students of which plaintiff complains, were employed. It was plaintiff's burden to convince the jury that this reason was a more [sic] pretext for age discrimination, and he failed to satisfy this burden. The jury believed defendant's explanation that certain workers were kept on because they were students about to graduate (in their fifth of five years), and not because they were younger than plaintiff.

In a disparate treatment case such as this one, plaintiff must show that the discrimination was intentional and deliberate. *Smithers; Williams v. General Motors Corp.*, 656 F.2d 120 (5th Cir. 1981); Loeb v. Textron [sic], 600 F.2d 1003 (1st Cir. 1979). That is, plaintiff was obligated to demonstrate that GM used age as a determinative factor, and consciously terminated plaintiff because of his age. Plaintiff claims that as a matter of law the articulated reason is insufficient. The statute allows an employer to use a "differentiation . . . based on reasonable factors other than age." 29 U.S.C. Section 623(f)(1). The students have a defined five-year course of instruction, culminating in a required thesis during their fifth year. The program is not the same as a "management trainee" program as plaintiff contends. Plaintiff has failed to demonstrate that GM intentionally discriminated on the basis of age, and the motion for judgment n.o.v. is therefore denied as to this claim.

On the claim regarding failure to recall, plaintiff alleges he was passed over in favor of some graduates of GMI, who were placed in positions for which he was qualified. GM contends that it did nothing more than follow its stated procedure in recalls of first using active employees, then using laid-off employees, and then making new outside hires. In this case the students, by virtue of their work-study, were active employees at the time the positions became available, and therefore were entitled to placement before plaintiff. The jury apparently accepted said premise in reaching its verdict.

Plaintiff contends that GM "willfully" violated the ADEA, and that therefore plaintiff is entitled to attorney's fees under the Act. Since the jury has determined that there was no discrimination, it could not have been willful.

To prove an allegation of fraud, plaintiff must prove five elements:

(1) a false representation;

(2) knowledge or belief by defendant of such falsity;

(3) intent that plaintiff act upon the representation;

(4) reasonable reliance by plaintiff; and

(5) resultant damage.

Louis Schlesinger Co. v. Wilson [sic], 22 N.J. 576 (1956). Plaintiff argues that GM fraudulently misrepresented both the reasons for his layoff and the conditions under which he would be recalled.

The jury found, in answer to a special interrogatory, that the defendant was not liable in fraud. This is consistent with any of several explanations, since only one element must be missing to preclude liability. The plaintiff argues that he relied in the sense that he failed to file a complaint until the statutory term had run, and the damage was that his right to bring suit was thereby lost. However, plaintiff was permitted to bring his suit, and he obtained a decision on the merits. Therefore the jury was justified in finding that there was no fraud and certainly no reliance to plaintiff's detriment.

Plaintiff also moves to amend his pleadings to conform to the evidence, pursuant to Fed. R. Civ. P. 15(b). He claims that the evidence adduced at trial supports claims under the NJLAD. During the long course of the pretrial proceedings in this case, this Court three times denied

essentially this same motion.[1] The Court sees no reason to alter these rulings, and for the reasons already expressed, denies the motion to amend the pleadings.

As an alternative to his other motions, plaintiff moves for a new trial on several grounds. First he contends that various evidence was either improperly admitted or improperly excluded at trial. For example, GM introduced evidence of a personality clash between plaintiff and his supervisor, after it had been stipulated that plaintiff had been laid-off solely for economic reasons. This evidence was proper, however, to demonstrate that plaintiff did not rely on his supervisor's stated reasons for dismissing him (which defendant still contends are the correct reasons). This fact, if proved, would have been sufficient to deny liability for fraud, and therefore was probative of the defense offered. As another example, the Court excluded plaintiff's evidence of GM's early retirement plan. Evidence such as this had been admitted in some cases as probative of an intent to discriminate, and plaintiff contends that if [sic] should have been admitted here also. However, since this was a disparate treatment case, the question was whether GM had intentionally discriminated against the plaintiff, and the GM policy and decisions of other employees would have been more prejudicial than probative. After a review of the evidence and plaintiff's objections, the Court concludes there is no reason to order a new trial on evidentiary considerations.

---

[1] See Orders of June 17, 1980; October 2, 1980; and July 24, 1981. The elements of the NJLAD are the same as for the ADEA, and plaintiff repeatedly sought to include the NJLAD claims in his complaint. The Court cannot conceive that the jury would have found for plaintiff on this claim in view of its finding on the federal claim.

Plaintiff also contends that the Court's instructions to the jury were so erroneous as to mandate a new trial. First, plaintiff argues that the Court was in error in charging that GM had to "purposefully and intentionally" use age as a discriminative factor in order to violate the ADEA. In a similar reduction-in-workforce case, the Fifth Circuit held that to establish a prima facie case, a plaintiff must show that the employer's decision was intentional, and that age was consciously used as a determinative factor in the decision. *Williams v. General Motors Corp.*, 656 F.2d 120, 129-30 (5th Cir. 1981). See also [sic] *Smithers v. Bailar*, 629 F.2d 892 (3d Cir. 1980). Intent is a necessary element of the offense. Plaintiff also argues that it was error not to instruct the jury as to the purpose of the ADEA as requested by plaintiff. Plaintiff had requested the Court to read a section of the Congressional explanation for the passage of the ADEA, and the Court denied plaintiff's request.

The quote requested reads, "It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age." This could too easily lead a jury to believe that Congress intended that employers should *prefer* older employees, and this is emphatically not the case. See [sic] *Loeb v. Textron*, 600 F.2d 1003 (1st Cir. 1979). The Court adequately informed the jury that the ADEA was enacted to prevent discrimination on the basis of age, and the failure to charge in the plaintiff's requested language was not sufficiently harmful to plaintiff to require a new trial.

As a third ground, plaintiff argues that there is a basic inconsistency in the jury's answers to the Special Interrogatories. In answer to Special Interrogatory 5 the jury found that plaintiff first had reason to suspect that age

was a determinative factor in his layoff on April 15, 1975, the date he sent a letter to the Department of Labor complaining of age discrimination. In answer to No. 6, the jury found that there had been no fraud committed. Plaintiff contends that since he had no reason to suspect discrimination until 1975, this is necessarily proof of fraud since the true nature of the situation was hidden from him by GM.

The Seventh Amendment does not permit the Court to search for an analysis under which the jury's answers are inconsistent. "Where there is a view of the case that makes the jury's answers to Special Interrogatories consistent, they must be resolved that way." *Atlantic & Gulf Stevedores, Inc. v. Ellerman Lines, Ltd.*, 369 U.S. 355, 364 (1962). See [sic] *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 293 (3d Cir. 1980).

However [sic] the Court finds no inconsistency with the answers to said interrogatories.

Finally, plaintiff contends that a new trial should be granted because the jury's answers are against the clear weight of the credible evidence. The motion for a new trial on this ground is denied.

The Court does not find error in any of the grounds asserted by plaintiff, nor any defects which would affect the substantial rights of the parties. Absent such effect, any errors are harmless, and do not require a new trial. Fed. R. Civ. P. 61.

The motions of plaintiff are DENIED in their entirety.

APPENDIX E

AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

§ 621. Congressional statement of findings and purpose

(a) The Congress hereby finds and declares that –

(1) in the face of rising productivity and affluence, older workers find themselves disadvantaged in their efforts to retain employment, and especially to regain employment when displaced from jobs;

(2) the setting of arbitrary age limits regardless of potential for job performance has become a common practice, and certain otherwise desirable practices may work to the disadvantage of older persons;

(3) the incidence of unemployment, especially long-term unemployment with resultant deterioration of skill, morale, and employer acceptability is, relative to the younger ages, high among older workers; their numbers are great and growing; and their employment problems grave;

(4) the existence in industries affecting commerce, of arbitrary discrimination in employment because of age, burdens commerce and the free flow of goods in commerce.

(b) It is therefore the purpose of this chapter to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; to help employers and workers find ways of meeting problems arising from the impact of age on employment.

§ 623. Prohibition of age discrimination

(a) Employer practices

It shall be unlawful for an employer—

(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;

(2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or

(3) to reduce the wage rate of any employee in order to comply with this chapter.

(b) Employment agency practices

It shall be unlawful for an employment agency to fail or refuse to refer for employment, or otherwise to discriminate against, any individual because of such individual's age, or to classify or refer for employment any individual on the basis of such individual's age.

(c) Labor organization practices

It shall be unlawful for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his age;

(2) to limit, segregate, or classify its membership, or to classify or fail or refuse to refer for employment

any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's age;

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

(d) **Opposition to unlawful practices; participation in investigations, proceedings, or litigation**

It shall be unlawful for an employer to discriminate against any of his employees or applicants for employment, for an employment agency to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because such individual, member or applicant for membership has opposed any practice made unlawful by this section, or because such individual, member or applicant for membership has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter.

(e) **Printing or publication of notice or advertisement indicating preference, limitation, etc.**

It shall be unlawful for an employer, labor organization, or employment agency to print or publish, or cause to be printed or published, any notice or advertisement relating to employment by such an employer or membership in or any classification or referral for employment by such a labor organization, or relating to any classification

or referral for employment by such an employment agency, indicating any preference, limitation, specification, or discrimination, based on age.

(f) Lawful practices; age as occupational qualification; other reasonable factors; seniority systems; employee benefit plans; discharge or discipline for good cause

It shall not be unlawful for an employer, employment agency, or labor organization—

(1) to take any action otherwise prohibited under subsections (a), (b), (c), or (e) of this section where age is a bona fide occupational qualification reasonably necessary to the normal operation of the particular business, or where the differentation is based on reasonable factors other than age;

(2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter, except that no such employee benefit plan shall excuse the failure to hire any individual, and no such seniority system or employee benefit plan shall require or permit the involuntary retirement of any individual specified by section 631(a) of this title because of the age of such individual; or

(3) to discharge or otherwise discipline an individual for good cause.

(g) Entitlement to coverage under group health plan

(1) For purposes of this section, any employer must provide that any employee aged 65 through 69

shall be entitled to coverage under any group health plan offered to such employees under the same conditions as any employee under age 65.

(2) For purposes of paragraph (1), the term "group health plan" has the meaning given to such term in section 162(i)(2) of Title 26.

§ 626. Recordkeeping, investigation, and enforcement

(a) **Attendance of witnesses; investigations, inspections, records, and homework regulations**

The Commission shall have the power to make investigations and require the keeping of records necessary or appropriate for the administration of this chapter in accordance with the powers and procedures provided in sections 209 and 211 of this title.

(b) **Enforcement; prohibition of age discrimination under fair labor standards; unpaid minimum wages and unpaid overtime compensation; liquidated damages; judicial relief; conciliation, conference, and persuasion**

The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: *Provided*. That li-

quidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

(c) **Civil actions; persons aggrieved; jurisdiction; judicial relief; termination of individual action upon commencement of action by Secretary; jury trial**

(1) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: *Provided,* That the right of any person to bring such action shall terminate upon the commencement of an action by the Commission to enforce the right of such employee under this chapter.

(2) In an action brought under paragraph (1), a person shall be entitled to a trial by jury of any issue of fact in any such action for recovery of amounts owing as a result of a violation of this chapter, regardless of whether equitable relief is sought by any party in such action.

(d) **Filing of charge with Commission; timeliness; conciliation, conference, and persuasion**

No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Commission. Such a charge shall be filed—

(1) within 180 days after the alleged unlawful practice occurred; or

(2) in a case to which section 633(b) of this title applies, within 300 days after the alleged unlawful practice occurred, or within 30 days after receipt by the individual of notice of termination of proceedings under State law, whichever is earlier.

Upon receiving such a charge, the Commission shall promptly notify all persons named in such charge as prospective defendants in the action and shall promptly seek to eliminate any alleged unlawful practice by informal methods of conciliation, conference, and persuasion.

(e) **Statute of limitations; reliance in future on administrative rulings, etc.; tolling**

(1) Sections 255 and 259 of this title shall apply to actions under this chapter.

(2) For the period during which the Commission is attempting to effect voluntary compliance with requirements of this chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

§ 627. Notices to be posted

Every employer, employment agency, and labor organization shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the Secretary setting forth information as the Secretary deems appropriate to effectuate the purposes of this chapter.

§ 628. Rules and regulations; exemptions

In accordance with the provisions of subchapter II of chapter 5 of Title 5, the Secretary of Labor may issue such rules and regulations as he may consider necessary or appropriate for carrying out this chapter, and may establish such reasonable exemptions to and from any or all provisions of this chapter as he may find necessary and proper in the public interest.

§ 630. Definitions

For the purposes of this chapter—

(a) The term "person" means one or more individuals, partnerships, associations, labor organizations, corporations, business trusts, legal representatives, or any organized groups of persons.

(b) The term "employer" means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year: *Provided*, That prior to June 30, 1968, employers having fewer than fifty employees shall not be considered employers. The term also means (1) any agent of such a person, and (2) a State or political subdivision of a State and any agency or instrumentality of a State or a political

subdivision of a State, and any interstate agency, but such term does not include the United States, or a corporation wholly owned by the Government of the United States.

(c) The term "employment agency" means any person regularly undertaking with or without compensation to procure employees for an employer and includes an agent of such a person; but shall not include an agency of the United States.

(d) The term "labor organization" means a labor organization engaged in an industry affecting commerce, and any agent of such an organization, and includes any organization of any kind, any agency, or employee representation committee, group, association, or plan so engaged in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours, or other terms or conditions of employment, and any conference, general committee, joint or system board, or joint council so engaged which is subordinate to a national or international labor organization.

(e) A labor organization shall be deemed to be engaged in an industry affecting commerce if (1) it maintains or operates a hiring hall or hiring office which procures employees for an employer or procures for employees opportunities to work for an employer, or (2) the number of its members (or, where it is a labor organization composed of other labor organizations or their representatives, if the aggregate number of the members of such other labor organization) is fifty or more prior to July 1, 1968, or twenty-five or more on or after July 1, 1968, and such labor organization –

(1) is the certified representative of employees under the provisions of the National Labor Relations Act, as amended, or the Railway Labor Act, as amended; or

(2) although not certified, is a national or international labor organization or a local labor organization recognized or acting as the representative of employees of an employer or employers engaged in an industry affecting commerce; or

(3) has chartered a local labor organization or subsidiary body which is representing or actively seeking to represent employees of employers within the meaning of paragraph (1) or (2); or

(4) has been chartered by a labor organization representing or actively seeking to represent employees within the meaning of paragraph (1) or (2) as the local or subordinate body through which such employees may enjoy membership or become affiliated with such labor organization; or

(5) is a conference, general committee, joint or system board, or joint council subordinate to a national or international labor organization, which includes a labor organization engaged in an industry affecting commerce within the meaning of any of the preceding paragraphs of this subsection.

(f) The term "employee" means an individual employed by any employer except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policymaking level or an immediate adviser with respect to

the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency, or political subdivision.

(g) The term "commerce" means trade, traffic, commerce, transportation, transmission, or communication among the several States; or between a State and any place outside thereof; or within the District of Columbia, or a possession of the United States; or between points in the same State but through a point outside thereof.

(h) The term "industry affecting commerce" means any activity, business, or industry in commerce or in which a labor dispute would hinder or obstruct commerce or the free flow of commerce and includes any activity or industry "affecting commerce" within the meaning of the Labor-Management Reporting and Disclosure Act of 1959.

(i) The term "State" includes a State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, the Canal Zone, and Outer Continental Shelf lands defined in the Outer Continental Shelf Lands Act.

§ 631. Age limits

(a) Individuals at least 40 but less than 70 years of age

The prohibitions in this chapter shall be limited to individuals who are at least 40 years of age but less than 70 years of age.

(b) **Employees or applicants for employment in Federal Government**

In the case of any personnel action affecting employees or applicants for employment which is subject to the provisions of section 633a of this title, the prohibitions established in section 633a of this title shall be limited to individuals who are at least 40 years of age.

(c) **Bona fide executives or high policymakers**

(1) Nothing in this chapter shall be construed to prohibit compulsory retirement of any employee who has attained 65 years of age but not 70 years of age, and who, for the 2-year period immediately before retirement, is employed in a bona fide executive or a high policymaking position, if such employee is entitled to an immediate nonforfeitable annual retirement benefit from a pension, profit-sharing, savings, or deferred compensation plan, or any combination of such plans, of the employer of such employee, which equals, in the aggregate, at least $27,000.

(2) In applying the retirement benefit test of paragraph (1) of this subsection, if any such retirement benefit is in a form other than a straight life annuity (with no ancillary benefits), or if employees contribute to any such plan or make rollover contributions, such benefit shall be adjusted in accordance with regulations prescribed by the Commission, after consultation with the Secretary of the Treasury, so that the benefit is the equivalent of a straight life annuity (with no ancillary benefits) under a plan to which employees do not contribute and under which no rollover contributions are made.